145-317

RECORD, CASE No. 13,453.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 301.

PIERRE FELIX, ELIZABETH FELIX, LOUIS ROBINETT, HARRIET ROBINETT, DENNIS FELIX, AND MARGARET FELIX, APPELLANTS,

vs.

MATTHEWSON T. PATRICK, MARY PATRICK, R. W. CLAYTON, HARRY B. MULFORD, THE OMAHA HORSE RAILWAY COMPANY, ALGERNON S. PATRICK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED DECEMBER 27, 1888.

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a In the Supreme Court of the United States.

PIERRE FELIX, ELIZABETH FELIX, LOUIS ROBINETT, HARRIET ROBINETT, DENNIS FELIX, and MARGARET FELIX
vs.
MATTHEWSON T. PATRICK *et al.*

The appellants in the above-entitled cause pray the decision and order of this court reversing the decision of the court below, with the costs of the appellants, for the reason that the court below erred in sustaining the demurrers of the appellees to the appellants' bill and in dismissing said bill, and to grant such other relief and order as in equity and good conscience may be proper.

J. C. COWIN,
Of Counsel with Appellants.

1 Pleas before the Hon. David J. Brewer, judge of the circuit court of the United States for the eighth circuit and district of Nebraska, and the Hon. Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court, at the term of November, A. D. 1888.

Be it remembered that on the 9th day of March, 1888, a bill was filed in the office of the clerk of said circuit court; which said bill is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

PIERRE FELIX *et al.*
vs.
MATTHEWSON T. PATRICK *et al.*
} In Equity. Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

Your orators, Pierre Felix, Elizabeth Felix, Louis Robinett, Harriet Robinett, Dennis Felix, and Margaret Felix, all of Mendota, in the State of Minnesota, and each and all of whom are citizens of the State of Minnesota, bring this their bill of complaint against Matthewson T. Patrick, Mary Patrick, R. W. Clayton, Harry B. Mulford, The Omaha Horse Railway Company, Algernon S. Patrick, John M. Wilson, Elof Nilsson, Lewis S. Reed, Josiah S. McCormick, Geo. T. Mills, Calvin H. Frederick, Helen A. Frederick, Frederick H. Davis, George Anna McCormick, The Omaha Real Estate and Trust Company, Wm. A. Gardner, Tilden M. Phillips, James T. Houston, Jacob Schreiner, George A. Hoagland, Dennis H.
2 Andrews, Benjamin F. Troxell, Jacob Williams, L. V. Morse, Thos. C. Bruner, Harris & Fisher, O. N. Ramsey, David M. Stewart, John F. Flack, William L. McCague, Julius Peycke, and Anna M. Hayward, of Omaha, and each and all of whom are citizens of the State of Nebraska, and thereupon complain and say—

That the value and amount in controversy in this action, exclusive of all interest and costs, exceeds the sum of $2,000.

Your orators further say that in the year 1854 one Sophia Felix was a half-breed or mixed blood of the Sioux or Dakota nation of Indians residing near Mendota, in the State of Minnesota.

Under and by virtue of a treaty of the Government of the United States, known as the treaty of Prairie Du Chien, made with the half-breeds or mixed bloods of the Dakota or Sioux nation of Indians, of date July 15th, 1830, and proclaimed February 1st, 1831, and an act of Congress approved July 17th, 1854, entitled "An act to authorize the President of the United States to cause to be surveyed a tract of land in the Territory of Minnesota belonging to half-breeds or mixed bloods of the Dakota or Sioux nation of Indians and for other purposes," the said Sophia Felix was entitled to have issued to her by the Government of the United States scrip for the location of 480 acres of land, as provided by that act.

Thereafter, to wit, in the year 1857, the United States, by and through its proper officers in that behalf as by law provided, issued to said Sophia Felix certificates of location or scrip to which she was entitled under said act, as follows:

Certificate No. 181, letters A and B, for 40 acres each; letter C, for 80 acres; letters D and E, for 160 acres each.

Thereafter and before the location of said scrip hereinafter
3 described the said Sophia Felix intermarried with one David Garnelle (sometimes called Gammelle).

Your orators further say that on the 31st day of March, 1860, some person or persons to your orators unknown, by certain wicked devices and fraudulent means, procured the said Sophia Felix, then Sophia Garnell, together with her husband, David Garnell, to execute a certain power of attorney in blank; also an instrument called a quitclaim deed, also executed in blank. A copy of said pretended power of attorney is attached to this bill and marked Exhibit "A;" a copy of the said quitclaim deed is attached hereto and marked Exhibit "B," and your orators pray that said exhibits may be taken as a part of this their bill. The parts of the said exhibits which are enclosed in parenthesis were blank at the time said instruments were executed and were filled in afterwards as hereinafter alleged, the words and figures so inserted and filled in afterwards being that part enclosed in parenthesis. Said instruments bear date of March 31, 1860.

Your orators further says that the said Matthewson T. Patrick, in the month of November, 1861, procured from some person or persons unknown to your orators possession of certain of said scrip so issued to the said Sophia Felix as aforesaid—that is to say, No. 181, letter A, for 40 acres, and No. 181, letter C, for 80 acres.

And thereafter, to wit, on the 21st day of November, 1861, the said Matthewson T. Patrick, in the name of Sophia Felix, made application to the United States land office at Omaha, Nebraska, to locate the scrip so received by him; and thereupon, in the name of said Sophia Felix, located the said scrip upon the following-described real estate, situate in the county of Douglas and in the then

Territory of Nebraska, to wit, the north half and the south-
4 east quarter of the southeast quarter of section number nine (9), township fifteen (15) north of range thirteen east, in the district of lands subject to sale at the land office at Omaha, Nebraska, containing one hundred and twenty (120) acres, in satisfaction of the said Sioux half-breed scrip so received by him as aforesaid.

In this behalf your orators further say that at the time of said location the said Sophia Felix had never parted with the title to or any interest in said scrip, and was the absolute owner thereof and sole beneficiary therein, and these facts the said Matthewson T. Patrick at that time and at all times well knew, and the said location inured wholly to the benefit of said Sophia Felix, although the said Sophia Felix had no knowledge that the said Matthewson T. Patrick had procured the possession of said scrip or that he had located the same.

Your orators, further complaining, say that the said Matthewson T. Patrick in securing possession of said scrip procured the same with the intent to appropriate the scrip to his own use and defraud the said Sophia Felix out of the same and out of all interest therein and out of all benefits thereunder, and located the same, designing it for his own use and benefit and with the fraudulent intent to deprive the said Sophia Felix out of all benefit and interest therein.

Your orators further say that in the further prosecution of said scheme to defraud the said Sophia Felix as hereinbefore set forth the said Matthewson T. Patrick, on or about the 21st day of November, 1861, secured the two blank papers heretofore described, copies of which are attached and marked Exhibits "A" and "B," and shortly after procuring the same caused the said pretended power of attorney to be filled out with
5 a description of said scrip and of the property in Douglas county so located with the said half-breed scrip belonging to said Sophia Felix, and caused to be written in said power of attorney the name of William Ruth as the person having authority to execute the same and to sell and convey the property, a description of which was so inserted in said pretended power of attorney; and in furtherance of said scheme to secure the said property the said defendant, Matthewson T. Patrick, at or about the same time that he filled out said pretended power of attorney, as hereinbefore described, also caused the said pretended quitclaim deed, a copy of which is attached hereto and marked Exhibit "B," to be filled out with the description of the property hereinbefore described and inserted the name of Matthewson T. Patrick as grantee, making the said instrument thus filled out to purport to be a conveyance by said Sophia and David Garnell of the property before described to the said Matthewson T. Patrick; and in this behalf your orators further say that the said Matthewson T. Patrick thereafter, to wit, on the 7th day of September, 1863, caused the said pretended power of attorney and quitclaim deed hereinbefore described to be filed for record in the recorder's office of Douglas county, in the then Territory of Nebraska, and which instruments were on that day

recorded in Book P of Deeds, at pages 48 and 50 respectively; and in furtherance of said wrongful designs the said Matthewson T. Patrick caused the said William Ruth, named by himself as attorney-in-fact and whose name was inserted in said power of attorney as aforesaid, to make, execute, and deliver to said Matthewson T. Patrick a certain pretended deed of conveyance of the property heretofore described by virtue of his pretended authority so granted by said power of attorney, a copy of which pretended deed of conveyance is hereto attached and marked Exhibit "C," and which your orators pray may be taken as part of this their bill.

6

Thereafter, to wit, on the day and date of the execution of the instrument last described, the said Matthewson T. Patrick caused said instrument to be filed for record in the office of the register of deeds of the county of Douglas, in the then Territory of Nebraska, and which instrument is recorded in Book O of Deeds, at page 632.

Your orators further say that at and before the time of the location of said scrip, as hereinbefore set forth, the defendant Matthewson T. Patrick was in possession of the premises upon which said scrip was located and had attempted to acquire title to the same by pre-emption, but in that respect was unsuccessful; and the said scrip was procured and located by the said Matthewson T. Patrick designedly for his own benefit and to acquire title to said tract of land, which title he could not acquire by virtue of the acts of Congress with respect to pre-emption.

Your orators further say that in furtherance of said scheme to wrong the said Sophia Felix the said Matthewson T. Patrick procured to be enacted by the Congress of the United States and approved by the President, February 2nd, 1869, an act entitled "An act to confirm the titles to certain lands in the State of Nebraska," and which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and benefits of an act entitled 'An act to confirm the titles to certain lands in the State of Nebraska,' approved the 25th day of July, A. D. 1868, be, and the same are, extended to the east half and northwest quarter of the southeast quarter of section nine (9), township fifteen (15), range thirteen (13) east, of the 6th principal meridian, in Douglas county, Nebraska, and that the title to the same is hereby confirmed to the parties holding by deed from the patentee.

7

Approved February 2nd, 1869."

Your orators further say that the said Matthewson T. Patrick never informed the said Sophia and David Garnelle or either of them, or your orators or either of them, or any other person related by blood to said Sophia Garnelle, that he had procured and located said scrip, or that he had procured said blank instruments and filled the same out, or has caused a deed to be executed conveying to himself the real estate hereinbefore described, or that he claimed any ownership therein, but, on the contrary, fraudulently concealed

the same and exercised every precaution to prevent said proceedings coming to the knowledge of said parties.

Recognizing the frailty of a title based upon the wrongful acts hereinbefore set forth, the said Matthewson T. Patrick endeavored for several years to secure the execution of a deed by said Sophia and David Garnelle without letting them know the character of the instrument whereby they would convey to said Patrick in fee the said real estate, and to that end procured his father, J. Patrick, to act for him and on his behalf, and upon such request J. Patrick did act, and in pursuance thereof, on the 21st day of September, 1863, wrote a letter, a copy of which is hereto attached, marked Exhibit "E."

Your orators, further complaining, say that all the acts of the said Matthewson T. Patrick in procuring said scrip and
8 said blank papers as aforesaid, in filling the same out as aforesaid, in procuring the execution of the said pretended warranty deed by the said Ruth as aforesaid, in recording said papers, and in securing said act of Congress to be passed were all the execution of an unlawful scheme devised and conceived by the said Matthewson T. Patrick to wrong and defraud said Sophia Felix out of said scrip and the said property as aforesaid. The said instruments so executed as aforesaid by the said Sophia and David Garnell were not intended by them to be used for the purpose of conveying the said property above described or any part thereof or any interest therein or any interest in said scrip to any person or persons whomsoever, or to grant to any person or persons whomsoever any authority whatever to grant or convey any of the property or interest therein or the said scrip or any interest therein, directly or indirectly, to the said Matthewson T. Patrick or to any person or persons whomsoever, and no consideration whatever moved to or was received by said Sophia or David Garnell or either of them, directly or indirectly, for the said scrip, the execution of said papers, or for the property above described.

Your orators further say, upon information and belief, that said Matthewson T. Patrick has claimed and asserted ownership in said premises ever since the location of said scrip under and by virtue of said location and the instruments hereinbefore described and still asserts such ownership and title.

A large part of said land has been platted and recorded as additions to the city of Omaha and divided into lots, blocks, and streets, and the said Matthewson T. Patrick has sold a large number of said lots and other of said property and given his war-
9 ranty deed and other instruments of conveyance therefor.

The said Matthewson T. Patrick claims to own and is in possession of all that part of said real estate hereinafter described immediately following his name as hereinafter set forth, and the other parties hereinbefore named claim to own by title derived from said Matthewson T. Patrick and are in possession of parts of said real estate. A description of that part and parcel so claimed by and in possession of each of said parties follows immediately after their respective names as hereinafter set forth, the said Mat-

thewson T. Patrick having conveyed such parts and parcels by his warranty deed.

Matthewson T. Patrick and Mary Patrick: Plat Patrick's addition, being the south $14\frac{3}{10}$ acres of the southeast quarter of the southeast quarter of section 9, township 15, range 13.

Plat Patrick's second addition, being the north $25\frac{7}{10}$ (or north 858.2 feet) acres of the southeast quarter of the southeast quarter of section 9, township 15, range 13.

Lot 5, in block 1.

Lots 3, 11, 12, and west one-half of the east one-half of lot 4, in block 2.

Lots 1 and 2, in block 5, and lot 4, in block 6, all in Patrick's addition to Omaha.

Lots 2, 3, and 12, in block 8.

Lots 1, 2, 3, 7, and 15, in block 9.

Lot 12, in block 10.

Lots 6, 7, 8, 9, and 15, in block 11.

Lots 5, 6, 11, and 12, in block 12, all in Patrick's second addition to Omaha.

Also all of the southeast quarter of the northeast quarter of the southeast quarter of section 9, township 15, range 13, except tax lot 31 as described below.

Also all of the southwest quarter of the northeast quarter of the southeast quarter of section 9, township 15, range 13, except that part now platted as Pope place, and also that part heretofore conveyed to the Omaha Horse Railway Company.

10 Tax lot 31, described as follows: Beginning at a point 660 feet south of the northeast corner of the southeast quarter of section 9, township 15, range 13 east, thence running west 390 feet to the east line of proposed extension of Pier street, thence south along east line of Pier street 120 feet, thence east 390 feet, thence north 120 feet to the place of beginning.

R. W. Clayton, owner of the west 180 feet of said tax lot 31, as above described.

Pope place, Harry B. Mulford and Matthewson T. Patrick: Beginning at the northeast corner of Lake and twenty-sixth streets, thence north $626\frac{1}{2}$ feet, thence east 120 feet, thence south $626\frac{1}{2}$ feet, thence west 120 feet to the place of beginning.

Omaha Horse Railway Company: Beginning 30 feet north of the southwest corner of the northeast quarter of the southeast quarter of section 9, township 15, range 13 east, thence running east along the north line of Lake street 441.3 feet to the west line of King street as extended north, thence north 296.12 feet, thence west 441.3 feet to the west line of the northeast quarter of the southeast quarter of section 9, thence south 296.12 feet to place of beginning, containing 3 acres, in the southwest corner of the northeast quarter of the southeast quarter of section 9, township 15, range 13.

Plat A. S. Patrick's addition to Omaha, Algernon S. Patrick: The north half of the northeast quarter of the southeast quarter of section 9, township 15, range 13 east, 20 acres.

Lots 5 and 7, in block 1.
Lots 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 15, 16, 17, and 18, in block 2.
Lots 3, 6, 7, 8, and 9, in block 3.
Lot 6, in block 4.
All of block 5.
11 Lots 1, 2, and 4, in block 8.
Lots 1, 6, 7, 8, and 9, in block 9.

John M. Wilson: All of block 6, in A. S. Patrick's addition, now platted as Wilson's addition to Kountze place.

Elof Nilsson: All of block 7, in A. S. Patrick's addition.

Plat Durant place, Lewis S. Reed: The east one-half of the northeast quarter of the northwest quarter of the southeast quarter of section 9, township 15, range 13, containing 5 acres.

Plat Clarendon, Josiah S. McCormick and George T. Mills: Southeast quarter of the northwest quarter of the southeast quarter and south half of the southwest quarter of the northwest quarter of the southeast quarter of section 9, township 15, range 13 east, 15 acres.

Lots 1, 2, 5, 6, 9, 10, 13, 14, 16, 17, 18, 21, and 22, in block 1.
Lots 11, 12, 23, and 24, in block 2.
Lots 7, 8, 11, 15, 19, 20, and 24, in block 3.

Plat Frederick's addition, Calvin H. and Helen A. Frederick: The west half of the north half of the southwest quarter of the northwest quarter of the southeast quarter of section 9, township 15, range 13, containing 2½ acres.

Plat Marion place, Frederick H. Davis: The northeast quarter of the southwest quarter of the northwest quarter of the southeast quarter of section 9, township 15, range 13, containing 2½ acres.

Also lots 21 and 22, in block 2, in Clarendon.

Plat Catalpa place, George Anna McCormick: The northwest quarter of the northwest quarter of the southeast quarter of section 9, township 15, range 13 east, containing 10 acres.

Lots 13 and 14, in block 2.

Omaha Real Estate and Trust Company: Lots 1 to 10, both inclusive, in block 1.
12 Lots 15 to 22, both inclusive, in block 1.
Lots 3 to 11, both inclusive, in block 2.
Lots 15, 18, 19, 20, and 22, in block 2.

William A. Gardner: Lots 11 to 14, both inclusive, in block 1.

Fielder M. Phillips: Lots 6, in block 1, A. S. Patrick's addition.
Also lot 5, in block 3, A. S. Patrick's addition.
Also lots 7, 8, 9, and 10, in block 2, Patrick's second addition.
Also lots 4, 5, and 6, in block 7, Patrick's second addition.
Also lot 1, in block 11, Patrick's second addition.
Also lots 1, 2, 3, and 4, in block 14, Patrick's second addition.

James T. Huston: Lots 1, 2, 3, and 4, in block 4, A. S. Patrick's addition.

Jacob Schreiner: Lots 10 and 11, in block 4, A. S. Patrick's addition.

Lots 14 and 15, in block 12, Patrick's second addition.

George A. Hoagland: Lots 11 and 12, in block 3, Patrick's addition.

Dennis H. Andrews, Benjamin F. Troxell, and Jacob Williams: Lots 1 to 9, both inclusive, in block 13, in Patrick's second addition, now platted as Andrews, Troxell, and Williams' subdivision.

L. V. Morse and Thomas C. Bruner: Lots 1 and 2, in block 3, Clarendon.

Also lots 5 and 6, in block 8, in Patrick's second addition.

Also lots 8 and 9, in block 9, in Patrick's second addition.

Also lot 1, in block 10, in Patrick's second addition.

Also lot 13, in block 12, in Patrick's second addition.

Harris and Fisher: Lots 1, 2, 3, 4, and 5, in block 15, Patrick's second addition.

O. N. Ramsey: Lot 9, in block 3, Patrick's addition.

Lots 5 and 6, in block 5, Patrick's addition.

Harry B. Mulford: Lots 8 and 9, in block 14, Patrick's second addition.

13 Plat Catalpa second addition, David M. Stuart: The west half of the west half of the northeast quarter of the northwest quarter of the southeast quarter of section 9, township 15, range 13 east, containing 2½ acres.

William L. McCague: Lots 4 to 9, both inclusive.

John F. Flack: Lots 11, 12, 13, and 14, now platted as Flack's subdivision.

Also lots 9 and 10, in block 7, Patrick's second addition.

Plat Van Beuren place, Julius Peycke: The north 505 feet of the east half of the west half of the northeast quarter of the northwest quarter of the southeast quarter of section 9, township 15, range 13 east.

Anna M. Hayward: The south 155 feet of the east half of the west half of the northeast quarter of the northwest quarter of the southeast quarter of section 9, township 15, range 13 east.

Upon information and belief your orators say that said grantees had notice of infirmities, if not actual fraud, attaching to the title of said Matthewson T. Patrick, for, among other things sufficient to put purchasers upon inquiry, the said pretended power of attorney and quitclaim deed, each containing a description of said land, are dated nearly two years prior to the scrip location. Upon information and belief your orators say that said Matthewson T. Patrick has for many years been in possession of said property and received large sums in rents and profits therefrom, which amounts are justly payable to your orators.

Your orators further say that on the 3rd day of July, 1863, the United States, through its proper officers in that behalf provided, issued to the said Sophia Felix its patent for the above-described premises, and on or about the 25th day of July, 1863, the said patent was filed for record in the recorder's office of Douglas
14 county, in the then Territory of Nebraska. A copy of the same is hereto attached and marked Exhibit "D."

Your orators further say that the said Sophia Garnell departed this life on or about the 25th day of December, 1865, and during

her lifetime she had no knowledge that the said Matthewson T. Patrick had secured and located said scrip, and had no knowledge whatever that the said pretended power of attorney and the said pretended quitclaim deed had been filled out or used in any manner whatever or had been recorded as aforesaid, and had no knowledge whatever that said pretended power of attorney had been filled out, executed, used, or placed on record, and had no knowledge as to what disposition had been made of said scrip, and had no knowledge whatever of any of the acts of the said Matthewson T. Patrick as hereinbefore set forth.

The said David Garnell departed this life in the year 1882. The mother of said Sophia Felix died before the year 1865, and the father of said Sophia Felix died on the 22nd day of October, 1876. The father, mother, and husband of said Sophia Garnell had no knowledge whatever of the facts herein set forth with respect to the acts and doings of the said Matthewson T. Patrick concerning said scrip and real estate.

Your orators further say that the said Sophia Felix died intestate and without issue surviving her; that her father died intestate; that your orators Pierre Felix, Dennis Felix, and Harriet Felix (now Robinett) are brothers and sister of the full blood of the said Sophia Felix and her sole heirs and the sole heirs of their said father. Your orator Elizabeth Felix is the wife of the said Dennis Felix, and Margaret Felix is the wife of said Pierre Felix, and Louis Robinett is the husband of said Harriet Felix, now Robinett.

Your orators further show and charge the facts to be that they had no knowledge whatever of any of the facts hereinbefore set forth of the issue, disposition, or location of said scrip or of any fact or allegation herein set forth in respect of the acts of said defendant, Matthewson T. Patrick, concerning said scrip and real estate until the year 1887.

In this behalf your orators further say that on the 29th day of April, 1868, the United States entered into a treaty with the several tribes of the Sioux Indians throughout the United States, in which treaty your orators were included, by virtue of which the United States agreed to allot to the several Indians of said tribes certain areas of agricultural land, and provided that the said members of the Sioux nation upon the allotment of land in severalty to them by the United States and the issuance of patents for the same to and the acceptance of the patents by said Sioux Indians, that then and thereupon the Sioux Indians so accepting the land should become citizens of the United States.

During the years 1886 and 1887 allotments of lands under and by virtue of said treaty were made by the United States to your several orators, and patents for the same were issued and delivered to your orators on the 29th day of August, 1887, and the same were accepted by your orators, and thereupon—that is to say, the 29th day of August, 1887—your several orators became citizens of the United States for the first time.

Your orators further say that during all the time of their several

existence before the 29th day of August, 1887, they main-
16 tained tribal relations as members of the band known as the Santee Sioux of the Sioux nation of Indians, and upon information and belief they say that up to the date last mentioned they and each of them were by the several acts of the Congress of the United States in that behalf provided and the policy of the Government of the United States with respect to administration of the Indian affairs of the nation and its government of the Indians inhibited and barred from instituting and maintaining any action at law or in equity or instituting any proceedings whatever in any of the courts, Federal and State, in the United States, were denied access to each and all of said courts, and had no legal standing therein as a party, except the right of trial upon a criminal charge.

And your orator- further say that the said Matthewson T. Patrick and the other persons and corporations named herein as claiming under him ought not to be permitted to have, occupy, hold, and enjoy said real estate first herein described or any part thereof, but ought to surrender to your orators the said lands so secured from the United States by said Sophia Felix in exchange for the said scrip belonging to her, for your orators submit that said scrip, under the treaty of Prairie Du Chien, proclaimed February 1st, 1831, and said act of Congress of July 17th, 1854, could not be sold, assigned, or transferred, directly or by any indirection; that Matthewson T. Patrick received, said scrip in trust for said Sophia Felix; that he located the same in trust for her; that he took possession of the lands so acquired by said scrip and held and still holds the same as trustee for her and her rightful heirs, and he ought not to be allowed to assume any adverse or hostile relation, either by the fraud and fraudulent instruments aforesaid or otherwise, to your orators, the lawful heirs of said Sophia Felix and the lawful heirs of her father, Pierre Felix; and your orators insist that he also ought to account
17 to your orators for the reasonable rents, issues, and profits of said land for all the time he has had possession thereof, as the same shall appear on an account to be taken and stated by one of the masters of this court; and your orators ought to be adjudged free from laches in the premises and in bringing this their action owing to the ignorance of your orators with respect to the wrong and fraud aforesaid, their peculiar personal circumstances and situation, and their legal disabilities.

Wherefore, and forasmuch as your orators are without remedy by the strict rules of the common law and can only have relief in this honorable court of equity, they pray the process of this honorable court to compel the appearance and answer of said Matthewson T. Patrick, Mary Patrick, R. W. Clayton, Harry B. Mulford, The Omaha Horse Railway Company, Algernon S. Patrick, John M. Wilson, Elof Nilsson, Lewis S. Reed, Josiah S. McCormick, Geo. T. Mills, Calvin H. Frederick, Helen A. Frederick, Frederick H. Davis, George Anna McCormick, The Omaha Real Estate and Trust Company, Wm. A. Gardner, Tilden M. Phillips, James T. Houston, Jacob Shreiner, George A. Hoagland, Dennis H. Andrews, Benjamin

F. Troxell, Jacob Williams, L. V. Morse, Thos. C. Bruner, Harris & Fosher, O. N. Ramsey, David M. Stewart, John F. Flack, William L. McCague, Julius Peycke, and Anna M. Hayward, but not under oath, the oath of each and all of said parties to answer hereto being hereby expressly waived.

Your orators also pray that this their cause may with all convenient speed be heard and tried; that it be by this court ordered, adjudged, and decreed that said Matthewson T. Patrick took said scrip, located the same, held and occupied and still holds and occupies the real estate firstly herein described as trustee, in trust
18 for the said Sophia Felix or Garnell and her heirs; that the said pretended power of attorney was and is illegal and void, being inhibited by the said act of Congress of 1854; that said pretended power of attorney, said pretended quitclaim deed, said deed so executed by said William Ruth as such pretended attorney-in-fact, each and all of them, from their several inceptions or pretended executions, were, ever since have been, and now are fraudulent, illegal, and void and *and* of no force or effect, and were not operative or available to grant, convey, and assign or transfer to said Matthewson T. Patrick any title, interest, or estate whatever in or to the said land or any part thereof, and that said instruments are a cloud upon your orators' title, and be cancelled; that the said act of Congress approved February 2nd, 1869, in so far as the same was intended to invest or confirm any title or interest in said lands to said Matthewson T. Patrick, is unconstitutional and void and did not operate to divest the heirs of said Sophia Felix of any title or interest in the said land; that said Matthewson T. Patrick never had any title, right, or interest in said lands except as trustee as aforesaid; that all bargains, grants, transfers, conveyances, and every instrument and contract or obligation of every nature executed by said Matthewson T. Patrick purporting to grant or convey or contracting to grant and convey or otherwise in any manner to encumber or effect said lands or any part thereof effecting the other parties hereto who claim an interest therein adverse to your orators or otherwise are null and void and of no force and effect and a cloud upon your orator's title and be cancelled; that your orators are the sole and lawful heirs of said Sophia Felix and her father and entitled to take said land by descent, and that they are
19 the owners in fee of said lands and all thereof and entitled to the immediate possession thereof, and that the parties hereto claiming adversely to your orators do surrender, give up, and deliver possession of said lands and every part and parcel thereof to your orators, and that said Matthewson T. Patrick account for the rents, issued, and profits before one of the masters of this court, allowing him credit for all taxes and other necessary expenses in caring for said property, and, upon report being made of said account, your orators have and recover the same from said Matthewson T. Patrick and your orators pray for costs of suit.

And your orators pray that they may have such other and further

relief as the nature of the case may require and equity and good conscience approve.

J. H. PARSONS,
CHAS. OGDEN,
Sol's for Complainants.

J. C. COWIN,
SHIPMAN, BARLOW, LAROEQUE & CHOATE,
Of Counsel.

Attached to said bill are exhibits in words and figures following, to wit:

20 EXHIBIT "A."

Power of Attorney.

Book "P," page 48.

Know all men by these presents that we, David Garnelle and Sophia Garnelle, late Sophia Felix, his wife, of Mendota, county Dakota, State of Minnesota, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, (William Ruth, of the city of Omaha, Douglas county, of the Territory of Nebraska), our true and lawful attorney, for us and in our name, place, and stead to grant, bargain, sell, and convey and confirm unto the purc*g*aser thereof the following-described piece or pieces or parcels of land, to be located for us and in our name by said scrip, numbers (one hundred and eighty-one (No. 181), letters A, C, D, and E, for four hundred and forty acres of land), it being Sioux half-breed Lake Pepin reserve scrip, said land described as follows, to wit: (The north half and southeast quarter of the southeast quarter of section nine (9), township fifteen (15) north, of range thirteen (13) east, sixth principal meridian, situate in the county of Douglas, in the Territory aforesaid; also lots one, two, three, and four of section twenty-nine (29), township twenty-eight (28) north, range nine (9) east, of the sixth principal meridian, situate in the county of Dakota, in the Territory aforesaid.)

And on such sale for us and in our name to execute and deliver to any purchaser thereof a good and sufficient deed therefor, hereby ratifying and confirming whatsoever our said attorney or his substitute shall lawfully do or cause to be done in the premises, hereby binding ourselves not to revoke this power of attorney.

21 Witness our hand and seals this thirty-first day of March, A. D. 1860.

his
DAVID x GARNELLE. [L. S.]
mark.
her
SOPHIA x GARNELLE. [L. S.]
mark.

Signed, sealed, and delivered in presence of—
W. H. McCOLLOM.
E. C. LAMBERT.
B. A. D. YOUNG.

STATE OF MINNESOTA, } ss:
County of Dakota, }

Be it known that on this thirty-first day of March, A. D. 1860, before the undersigned personally came David Garnelle and Sophia Garnelle, his wife (late Sophia Felix), the parties to the foregoing power of attorney, to me personally known to be the identical persons described in and who executed the said power of attorney, and they acknowledged that they executed the said instrument freely and voluntarily for the uses and purposes therein expressed; and the said Sophia, on a private examination by me separately and apart from her husband, acknowledged that she executed the said power of attorney freely and voluntarily, without fear or compulsion from any one.

Witness my hand and seal the day and year first above written.

[SEAL.] WM. H. McCOLLOM,
Notary Public.

UNITED STATES OF AMERICA, } ss:
State of Minnesota, }

SECRETARY'S OFFICE.

The secretary of state of the State of Minnesota does hereby
22 certify that William H. McCollom, whose name appears subscribed to the annexed instrument, was at the date thereof a notary public in and for the State of Minnesota, residing in the county of Dakota, duly appointed and qualified and empowered by the laws of this State to administer oaths, take depositions, acknowledgments of deeds and other written instruments, and exercise all such powers and duties as by the law of nations and according to commercial usages may be exercised and performed by notaries public, and that full faith and credit are due and should be given to his official acts as such notary.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at the capitol, in Saint Paul, this eighth day of June, A. D. 1861.

[SEAL.] J. H. BAKER,
Secretary of State.

STATE OF MINNESOTA, } ss:
County of Dakota, }

I, George S. Whitman, clerk of the district court within and for said county and State, do hereby certify that William H. McCollom, whose genuine signature is subscribed to the acknowledgment of the foregoing letters of attorney, was at the date thereof an acting notary public in and for said county, duly commissioned and qualified and authorized to administer oaths and to take such acknowledgment; that I am well acquainted with the handwriting of such officer, and I believe his signature thereunto appended to be genuine.

And I further certify that the said instrument is executed and acknowledged according to the laws of the State of Minnesota.

Witness my hand and seal of office this 20th day of August,
23 A. D. 1863, at Hastings, in said county and State.

G. S. WHITMAN,
[SEAL.] *Clerk of Dist. Court, Dakota Co., Minn.*

Recorded September 7, 1863, at 4 o'clock p. m.

[U. S. internal revenue, 5c.]

EXHIBIT "B."

Book P, page 50.

Know all men by these presents that David Garnelle and Sophia Garnelle, late Sophia Felix, his wife, of Mendota, in the county of Dakota and State of Minnesota, in consideration of the sum of one dollar to them in hand paid by (Matthewson T. Patrick, of Omaha, in the county of Douglas and Territory of Nebraska), the receipt whereof is hereby acknowledged, *had* bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim, unto the said (Matthewson T. Patrick), his heirs and assigns forever, all their right, title, interest, claim, or demand which they now have or may hereafter in any way acquire in and to the following-described pieces or parcels of lands, situate and being in (the counties of Douglas and Dakota and Territory of Nebraska, described as follows, viz: The north half of the southeast quarter of the southeast quarter of section nine (9), township fifteen (15) north, of range thirteen (13) east, sixth principal meridian, situate in the county of Douglas, in the Territory aforesaid; also lots 1, 2, 3, and 4 of section twenty-nine (29), township twenty-eight (28) north, range nine (9) east, of the sixth principal meridian, situate in the county of Dakota, in the Territory aforesaid); to have and to hold the above quitclaimed premises, with all the privileges and appurtenances thereto
24 belonging, to the said (Matthewson T. Patrick), his heirs and assigns forever, so that neither they or either, the said David Garnelle or Sophia Garnelle, his wife, them or either of their heirs or assigns or any person claiming by, from, or under them or either of them shall have any right, title, interest, or demand in or to the aforesaid premises.

In witness whereof we have hereunto set our hand- and seals the 31st day of March, A. D. 1860.

his
DAVID x GARNELLE.
mark.

her
SOPHIA x GARNELLE.
mark.

Signed, sealed, and delivered.
W. H. McCOLLOM.
B. A. D. YOUNG.

STATE OF MINNESOTA, } *ss:*
County of Dakota, }

Be it remembered that on this thirty-first day of March, A. D.

1860, personally appeared before me, the undersigned, the signers and sealers of the within written instrument, and acknowledged the same to be their free act and deed for the uses and purposes therein expressed; and the said Sophia Garnelle, late Felix, being by me examined separate and apart from her husband, she acknowledged that she executed the same freely and without any fear or compulsion from any one.

[SEAL.] WM. H. McCOLLOM,
Notary Public.

UNITED STATES OF AMERICA, *State of Minnesota,* } ss:

SECRETARY'S OFFICE.

The secretary of state of the State of Minnesota does hereby certify that William H. McCollom, whose name appears subscribed to the annexed instrument, was at the date thereof a notary public in and for the State of Minnesota, residing in the county of Dakota, duly appointed and qualified and empowered by the laws of this State to administer oaths, take depositions, acknowledgments of deeds and other written instrument-, and exercise all such powers and duties as by the law of nations and according to commercial usages may be exercised and performed by notaries public, and that full faith and credit are due and should be given to his official acts as such notary.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at the capitol, in Saint Paul, this eighth day of June, A. D. 1861.

[SEAL.] J. H. BAKER,
Secretary of State.

STATE OF MINNESOTA, *County of Dakota,* } ss:

I, George A. Whitman, clerk of the district court within and for said county and State, do hereby certify that William H. McCollom, whose genuine signature is subscribed to the acknowledgment of the foregoing quitclaim deed, was at the date thereof an acting notary public in and for said county, duly commissioned and qualified and authorized to take such acknowledgment; that I am well acquainted with the handwriting of such officer, and that I believe his signature thereunto appended to be genuine; and I further certify that the said instrument is executed and acknowledged according to the law of the State of Minnesota.

Witness my hand and seal of office this 20th day of August, A. D. 1863, at Hastings, in said county and State.

[SEAL.] G. S. WHITMAN,
Clerk of the District Court, Dakota Co., Minn.

Recorded September 7, 1863, at 4 o'clock p. m.

[U. S. inter. rev., 5c.]

EXHIBIT "C."

Book O, page 632.

Garnelle to Patrick.

This indenture, made this twenty-fifth day of July, A. D. 1863, between David Garnelle and Sophia Garnelle (late Sophia Felix), his wife, of Mendota, in the county of Dakota, in the State of Minnesota, by *his* attorney-in-fact, William Ruth, of the first part, and Matthewson P. Patrick, of the city of Omaha, in the county of Douglas and Territory of Nebraska, of the second part, witnesseth:

That the said David Garnelle and Sophia Garnelle, his wife, by their attorney-in-fact, William Ruth, acting by virtue of a certain letter of attorney under the hands of the said parties of the first part and by them duly acknowledge on the 31st day of March, 1860, for and in consideration of the sum of one dollar in hand paid, by these presents and in virtue of the authority given by the said letter of attorney, hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said party of the second part and to his heirs and assigns forever the following-described premises, situated in the said county of Douglas and Territory of Nebraska, and described as follows, to wit: The north half of the southeast quarter and the southeast quarter of the southeast quarter of section number nine (9), in township number fifteen (15) north, of range number thirteen (13) east, of the sixth principal meridian, together with the appurtenances:

To have and to hold unto the said Matthewson T. Patrick, party of the second part, and to his heirs and assigns forever; and
27 the said parties of the first part, by their attorney-in-fact aforesaid, in virtue of the power and authority aforesaid, do hereby covenant and agree to and with the said party of the second part and his heirs and assigns that they, the said parties of the first part, are lawfully seized of said premises; that they are free from incumbrance; that they have good right and lawful authority to sell and convey the same, and that they, the said parties of the first part, will forever warrant and defend the title to said premises to the said party of the second part, his heirs and assigns, against the lawful claims and demands of all persons whomsoever.

In witness whereof the said William Ruth, as attorney-in-fact aforesaid, hath hereunto set the hand of the said David Garnell and Sophia Garnelle, together with his own hand, as attorney-in-fact, the day and year first above written.

[U. S. int. rev., $5.00.]

DAVID GARNELLE,
SOPHIA GARNELLE,
By WM. H. RUTH,
Their Att'y-in-Fact.

In presence of—
J. N. H. PATRICK.
OSCAR F. DAVIS.

TERRITORY OF NEBRASKA, } ss:
County of Douglas, }

On this 25th day of July, A. D. 1863, at the city of Omaha, in said county and Territory, before me, a notary public in and for said county, personally appeared the above-named William Ruth, to me personally known to be the identical person who executed the foregoing deed, and in his own name and in the name of his constituents and principals, David Garnelle and Sophia Garnelle, his wife, in due form of law acknowledged the foregoing instrument to be his own voluntary act and deed and the voluntary act and deed of his constituents and principals, the said David and Sophia Gar-
28 nelle, by him, the said William Ruth, done and executed by virtue of a letter of attorney to him for that purpose executed and acknowledged.

In witness whereof I have hereunto set my hand and official seal this 25th day of July, A. D. 1863.

[SEAL.] OSCAR F. DAVIS,
Notary Public.

Recorded July 25, 1863, at 5 o'clock and 30 minutes p. m.

EXHIBIT "D."

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Certificate 181 A; acres, 40.

Certificate 181 C; acres, 80.

Whereas by the act of Congress approved on the 17th day of July, 1854, entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half-breeds or mixed bloods of the Dacotah or Sioux nation of Indians, and for other purposes," to which Congress passed an amendatory act approved May 19, 1858, in which said act of 1854 authority is given for the issue and location of Dacotah or Sioux half-breeds certificate or scrip; and whereas there has been deposited in the General Land Office of the United States a certificate- of the register and receiver of the land office at Omaha, No. 1, whereby it appears that Dacotah or Sioux half-breed certificate, Nos. 181 A, for 40 acres, and 181 C, for 80 acres, issued by the Commissioner of Indian Affairs, in favor of Sophia Felix, have been located and surrendered by the said Sophia Felix
29 in full satisfaction for the north half of the southeast quarter and the southeast quarter of the southeast quarter of section nine, in township fifteen north, of range thirteen east, in the district of lands subject to sale at Omaha, Nebraska, containing one hundred and twenty acres, according to the official plat of the public lands returned to the General Land Office by the surveyor general:

Now know ye that the United States of America, in consideration

of the premises, have given and granted, and by these presents do give and grant, unto the said Sophia Felix and to her heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatever nature thereunto belonging, unto the said Sophia Felix and to her heirs and assigns forever.

In testimony whereof I, Abraham Lincoln, President of the United States of America, have caused these letters to be made patent and seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the third day of July, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States in the eighty-seventh.

By the President:

ABRAHAM LINCOLN,
By W. O. STODDARD, *Secretary.*

Recorded, vol. 5, page 6.

J. N. GRANGER,
Recorder of the General Land Office.

EXHIBIT "E."

30 OMAHA, *Sept.* 21*st*, 1863.

George L. Otis, Esq.

DEAR SIR: You recollect that when I parted with you at St. Paul we supposed that there would be no difficulty in procuring the signature of David Gammelle and Sophia Felix to the several papers which you made out if the sum of $100 *dollars* were presented to them. I have consulted the several parties and they are willing to pay the amount and fee to you for your services in the matter if it can be accomplished.

You will please see Mr. Steele or Mr. Collom or either or both, as in your judgment may be best, and have the feeler thrown out without giving the parties any particular information and let me know the result as soon as you conveniently can, and if it can be done the money will be forwarded to you along with the papers. You are aware that the signature of both parties will be required. Please inform me by return mail what price 600 acres of Sioux scrip can be purchased at; a friend of mine desires that amount to locate the same unsurveyed lands with.

Truly and respectfully yours, &c., J. PATRICK.

Upon the back of said bill appear endorsements in words and figures following, to wit:

No. 167 M. In the circuit court of the United States for the district of Nebraska. Pierre Felix *et al. vs.* Matthewson T. Patrick *et al.* In equity. Bill of complaint. Filed Mar. 9, 1888. Elmer D. Frank, clerk. J. C. Cowin, Shipman, Barlow, Laroeque & Choate, of counsel. J. H. Parsons, Charles Ogdon, solicitors for complainants.

31 Thereupon, afterwards, to wit, on the 7th day of May, 1888, demurrers were filed in said case; which said demurrers are in words and figures following, to wit:

Demurrer of Mathewson T. Patrick et al.

In the Circuit Court of the United States for the District of Nebraska.

PIERRE FELIX, ELIZABETH FELIX, LOUIS ROBINETT, Harriett Robinett, Dennis Felix, and Margaret Felix, Complainants,
vs.
MATTHEWSON T. PATRICK *et al.*, Defendants.
} Demurrer.

The joint and several demurrer of Mathewson T. Patrick, Harry B. Mulford, Algernon S. Patrick, Calvin H. Frederick, Helen A. Frederick, Dennis H. Andrews, and Elof Nilson, defendants, to the bill of complaint of the above-named complainants.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill certained to be true in such manner and form as the same are therein set forth and alleged, demur to said bill, and for cause of demurrer showeth—

That said complainants have not made or stated such a case as entitles them in a court of equity to the relief so prayed for or any part thereof in this, that it appears by said bill that the complainants have been guilty of such laches in the bringing of this their said bill as to bar their right to prosecute this action in a court of equity.

2nd. That it is not made to appear by said bill that the complainants used either due or reasonable diligence in the discovery of their rights in the said bill complained of, and that
32 said bill does not set forth the time when the complainants discovered the frauds complained of, and does not set forth what particular frauds were practiced by these defendants or what concealment, if any, was practiced by the defendants or either of them which prevented or tended to prevent the complainants from discovering the frauds complained of nor what fradulent means, if any, the defendants or either of them resorted to to keep the complainants in ignorance of such pretended frauds so as to entitle the complainants in a court of equity to the relief so prayed for.

3rd. These defendants, for cause of demurrer to said bill of complaint, further show that the complainants have not made or stated such a case in their bill of complaint as entitles them to have the defendants or either of the- declared to hold the property in controversy as a trustee for the complainants, and have not made or stated such a case as entitles them to either have or recover the title or possession of the property in the bill of complaint described, as in the bill so prayed for.

4th. These defendants, for further demurrer, show to the court that the complainants have not made or stated in their said bill of

complaint such a case as entitles them to prosecute this action in a court of equity or to have any relief in the premises whatsoever.

5th. These defendants, for further cause of demurrer, show to the court that said complainants have not made or stated such a case as entitled them in a court of equity to the relief so prayed for.

Wherefore and for divers other good causes appearing in the said bill these defendants pray the judgment of this honorable court whether they shall be compelled to make any answer to the said bill whatsoever.

33 I hereby certify that, in my opinion, the foregoing demurrer of the defendants herein named to the bill of complaint of complainants is well founded in law and proper to be filed in the above cause.

[SEAL.] JNO. L. WEBSTER,
Sol. for Above Named Defendants.

Attached to said demurrer is a paper in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

PIERRIE FELIX *et al.* *vs.* MATTHEWSON T. PATRICK *et al.* } Affidavit of Matthewson T. Patrick.

UNITED STATES OF AMERICA, *District of Nebraska*, } *ss:*

Matthewson T. Patrick, being first duly sworn, deposes and says that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

MATHEWSON T. PATRICK.

Subscribed in my presence and sworn to before me this 7th day of May, 1888.

[SEAL.] HATTIE DUNCAN,
Notary Public.

Upon the back of said demurrer appear endorsements in words and figures following, to wit:

No. 167 M. U. S. circuit court, district of Nebraska. Pierre Felix *et al.*, plaintiff, *vs.* M. T. Patrick *et al.*, defendants. Demurrer. Filed May 7th, 1888. Elmer D. Frank, clerk. Jno. L. Webster.

Demurrer of Josiah S. McCormick et al.

In the United States Circuit Court, District of Nebraska.

34 PIERRE FELIX *et al.*, Complainants,
vs.
M. T. PATRICK *et al.*, Respondents.

Now come the respondents Josiah S. McCormick, George T. Mills, Frederick H. Davis, George Anna Remington, The Omaha Real Estate and Trust Company, William A. Gardner, F. M. Phillips, George A. Hoagland, Dennis H. Andrews, Benjamin H. Troxell, Jacob Williams, L. V. Morse, Thomas C. Brunner, Harris & Fisher, John F. Flack, Louis S. Reed, R. W. Clayton, and William L. McCague by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and allege-, do demur thereto, and for cause of demurrer showeth:

First. That the said complainants have not by their said bill made such a case as entitles them in a court of equity to any relief from or against these respondents or either of them touching the matters contained in the said bill or any of such matters.

Second. That said plaintiffs in said bill do not show any title to the premises in question.

Third. That by said bill it is shown that said plaintiffs or those from whom they claim might at any time have maintained a suit in this court upon the facts as in this bill alleged.

Fourth. That the bill presents gross laches; and *plaintiff* invokes the statute of limitations of the State of Nebraska as well as the inherent doctrine of courts of equity attaching to such matters. Wherefore and for divers other good causes of demurrer appearing in said bill of complaint these respondents doth demur to said bill and all matters and things therein contained, and humbly pray the judgment of this honorable court whether they or either of
35 them shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with their costs in this behalf sustained.

I certify that it is my opinion the foregoing demurrer of the above-named respondents to the bill of complaint of the above-named complainants is well founded in law and proper to be filed in the above cause.

G. W. AMBROSE,
Solicitor for Respondents.

UNITED STATES OF AMERICA, *District of Nebraska*, } *ss:*

G. W. Abrose, being duly sworn, deposes and says that he is the solicitor for the above-named respondents; that he has read the foregoing demurrer to the bill of complaint in this suit, and that the

same is not interposed for the purpose of delaying said suit or any other proceedings therein.

G. W. AMBROSE.

Subscribed in my presence and sworn to before me this 7th day of May, 1888.

ELMER D. FRANK, *Clerk.*

Upon the back of said demurrer appear endorsements in words and figures following, to wit:

No. 167, Doc. M. Pierre Felix *et al. vs.* M. T. Patrick *et al.* Demurrer for certain respondents. Filed May 7, 1888. Elmer D. Frank, clerk. G. W. Ambrose, solicitor.

Thereupon, afterwards, to wit, on the 22nd day of May, 1888, a demurrer was filed in said case; which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

PIERRE FELIX, ELIZABETH FELIX, LOUIS ROBINETT, HARRIET ROBINETT, DENNIS FELIX, and MARGARET FELIX, Complainants,
vs.
36 MATTHEWSON T. PATRICK, THE OMAHA HORSE RAILWAY Co., *et al.*, Defendants.

The demurrer of The Omaha Horse Railway Company, one of the defendants, to the bill of complaint of the above-named complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill contained to be true in such manner and form as the same are therein set forth and allege-, demurres to said bill, and for cause of demurrer showeth—

That said complainants have not made or stated such a case as entitles them in a court of equity to the relief so prayed for or any part thereof, in this, that it appears by said bill that the complainants have been guilty of such laches in the bringing of this their said bill as to bar their right to prosecute this action in a court of equity.

2nd. That it is not made to appear by said bill that the complainants used either due or reasonable diligence in the discovery of their rights in the said bill complained of, and that said bill does not set forth the time when the complainants discovered the frauds complained of, and does not set forth what particular frauds were practiced by these defendants or what concealment, if any, was practiced by the defendants or either of them which prevented or tended to prevent the complainants from discovering the frauds complained of, nor what fraudulent means, if any, the defendants or either of them resorted to to keep the complainants in ignorance

of such pretended frauds so as to entitle the complainants in a court of equity to the relief so prayed for.

3rd. This defendant, for cause of demurrer to said bill of complaint, further shows that the complainants have not made or stated such a case in their bill of complaint as entitled them to
37 have the defendants or either of them declared to hold the property in controversy as a trustee for the complainants, and have not made or stated such a cause as entitles them to either have or recover the title or possession of the property in the bill of complaint described, as in the bill so prayed for.

4th. This defendant, for further cause of demurrer, shows to the court that the complainants have not made or stated in their said bill of complaint such a case as entitles them to prosecute this action in a court of equity or to have any relief in the premises whatsoever.

5th. This defendant, for further cause of demurrer, shows to the court that said complainants have not made or stated such a case as entitles them in a court of equity to the relief so prayed for; wherefore and for divers other good causes appearing in the said bill this defendant prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill whatsoever.

GEO. E. PRITCHETT,
Solicitor and of Counsel for Def't, Omaha Horse Railway Company.

I hereby certify that, in my opinion, the foregoing demurrer of the defendant herein named to the bill of complaint of complainants is well founded in law and proper to be filed in the above cause.

GEO. E. PRITCHETT,
Of Counsel for Respondent, Omaha Horse R'y Co.

In the Circuit Court of the United States for the District of Nebraska.

PIERRE FELIX *et al.*, Comlainants,
vs.
MATTHEWSON T. PATRICK, THE OMAHA HORSE RAILWAY COMPANY, *et al.*, Def'ts.

UNITED STATES OF AMERICA,
District of Nebraska, } *ss:*

38 George E. Pritchett, being first duly sworn, deposes and says that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

GEO. E. PRITCHETT.

Subscribed in my presence and sworn to before me this 22nd day of May, 1888.

ELMER D. FRANK, *Clerk.*

Upon the back of said demurrer appear endorsements in words and figures following, to wit:

No. 167, doc. M. U. S. circuit court, district of Nebraska. Pierre Felix *et al. vs.* M. T. Patrick, The Omaha Horse Railway Co., *et al.* Demurrer. Geo. E. Pritchett, solicitor for defendant Omaha Horse R'y Co. Filed May 22, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the May term of said court, on the 23rd day of May, 1888, the following proceedings were had in said case, as appears of record on folio 797, Journal M, of said court:

PIERRE FELIX *et al.*
vs.
MATTHEWSON T. PATRICK *et al.* } Cause Submitted.

This cause, coming on for hearing on the demurrer of defendants to the bill of complaint herein, was argued and submitted to the court by solicitors for the respective parties; whereupon, on motion, thirty days is allowed in which to file briefs herein, and the court takes said cause under consideration.

Thereupon, afterwards, to wit, on the 29th day of October, 1888, an opinion was filed in said case; which said opinion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebr.

PIERRE FELIX *et al.*
against
MATTHEWSON T. PATRICK *et al.*

39 *Opinion.*

BREWER, *C. J.:*

This case is submitted on demurrer to the bill. The facts, as alleged, are these:

In 1854 one Sophia Felix was a half-breed Sioux Indian, residing near Mendota, in Minnesota. Under and by virtue of the treaty with the Sioux Indians, of date July 15th, 1830, and proclaimed February 1st, 1831, and an act of Congress approved July 17th, 1854, said Sophia Felix was entitled to receive from the Government scrip for the location of 480 acres. In 1857 this scrip was issued to her in separate parcels. The act provided that no transfer or conveyance of the scrip should be valid. Afterwards said Sophia Felix intermarried with one David Garnelle. On the 31st of March, 1860, some persons unknown, by fraudulent practices, obtained from her and her husband a portion of this scrip good for a hundred and twenty acres; also a blank power of attorney, duly acknowledged, for the location of said scrip and for the conveyance of the land after location; also a blank quitclaim deed, duly acknowledged. In these instruments the name of the attorney, the description of the land, and the name of the grantee were blank. In November, 1861, the defendant, Matthewson T. Patrick, obtained possession of this scrip

and these blank instruments from some unknown persons. Prior to that time said Patrick has been in possession of the premises now in controversy, seeking to acquire title thereto by pre-emption, but had been unsuccessful, the land being within the corporate limits of the town of Omaha. After obtaining possession of this scrip Patrick used it to enter the land, and, July 3, 1863, the patent was issued in the name of Sophia Felix. The blanks in the instruments were filled out with the name of an attorney, a description of the land, and the name of Patrick as grantee, and
40 the attorney thus names in the power of attorney executed another deed in the name of Sophia Garnell and her husband to him. These instruments were all placed of record. Patrick knew at the time of these transactions—indeed, was charged by law with knowledge of the fact—that the scrip was inalienable, and therefore was still the property of Sophia Felix; yet he used it for the purpose of securing title to the land to himself, and did not pretend and was not attempting to act as her agent. On July 25th, 1868, Congress passed an act confirming the title to certain lands in the city of Omaha which had been entered with Indian or half-breed scrip. The land in question was, however, in express terms exempted from the operation of this act. Afterwards, on February 2, 1869, another act was passed touching this land, which act reads as follows: "An act supplementary to an act entitled 'An act to confirm the titles to certain lands in the State of Nebraska.' Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the provisions and benefits of an act entitled 'An act to confirm the title to certain lands in the State of Nebraska, approved the 25th day of July, anno Domini eighteen hundred and sixty-eight, be, and the same are hereby, extended to the east half and northwest quarter of the southeast quarter of section nine, township fifteen, range thirteen east, sixth principal meridian, in Douglas county, Nebraska, and that the title of the same is hereby confirmed to the parties holding by deed from the patentee." 15 U. S. Stat. at Large, 269. The tract lies, as hereinbefore stated, within the limits of the city of Omaha; has been platted into lots and blocks, and large numbers of lots sold to individuals, many of whom are joined as parties defendant. It has become of immense value—worth, as stated by counsel, from a million to a million and a half dollars. Sophia Felix Garnelle died on the 25th day of December, 1865, without children and intestate. Her husband, David Garnelle, died in 1882; her
41 mother died before her, and her father died October 22, 1876. The present plaintiffs are her brothers and sister and her sole heirs. Neither she nor her husband nor father nor these plaintiffs knew what had become of the scrip, or that it had been entered for this land, until the year 1887. The present plaintiffs became citizens of the United States for the first time on August 29th, 1887, having then severed their tribal relations with the Sioux Indians. This bill was filed in the present year and seeks to charge the defendants, as trustee-, for the benefit of plaintiffs, and asks that the power of attorney and the two deeds be cancelled as clouds upon their title,

and the act of Congress of February 2nd, 1869, in so far as it attempted to vest title in Patrick, be declared unconstitutional and void, and also that possession be delivered to them.

Several grounds of demurrer were urged and argued by counsel with great earnestness and ability before my brother Dundy and myself. The two principal ones are as to the effect of the act of Congress of February 2, 1869, and the staleness of plaintiffs' claim. It will be noticed that the act of Congress confirms the title "to the parties holding by deed from the patentee." Now, if the land, by reason of its location within corporate limits, was not subject to preemption or private entry, as seems probable—Sec. 2258 U. S. Rev. Stat., Root *vs.* Shields, Woolworth, 340; Eldred *vs.* Sexton, 19 Wallace, 189—it may be that the patent in 1863 was improperly issued, and that the equitable title still remained in the United States, and a plausible argument is made that Congress by this act of '69 vested the title, which still equitably remained in the Government, in Patrick as an apparent, at least, grantee of the patentee; but I do not care to discuss this question, for to my mind the other defense is satisfactory and clear.

Prior to 1861 Patrick has been in possession of these lands
42 seeking to acquire title from the Government. In that year he obtained possession of this scrip, and in 1863 acquired the patent—twenty-eight years after Sophia Felix had parted with her scrip, twenty-seven years after defendant had obtained and used the scrip, 25 years after the patent had been issued—and when the land, with the growth of the city of Omaha, had risen in value from a mere nominal sum to over a million of dollars, these plaintiffs, who had done nothing to assist in the development and growth of the city, done nothing towards bringing about the increased value of the land, ask that this enormous property be given to them on the ground that their ancestor was defrauded of the scrip which originally paid for it. If an action at law had been instituted the statute of limitations would long since have been a bar. Why should not equity follow the law and protect these defendants against this ancient claim? It is insisted that defendants are trustees, and that plaintiffs are the *cestuis que trust.*, and that no statute of limitations runs against the enforcement of a trust until at least the repudiation of the trust is known. This may be true in case of an express trust, but clearly there was none such here. An express trust implies a fiduciary relation consciously and intentionally entered into by some contract or agreement between the parties, but Patrick never intended to act or pretended to act as the mere agent of Sophia Felix. What he did, even if wrongful and in violation of her rights, was done from the first for himself and in his own behalf. The averments in the bill show that he never took this scrip intending to act as her agent, but that he took it wrongfully and in violation of her right. It is not even alleged that she parted with this scrip to an agent, but the averment is that it was by some fraudulent practices obtained from her.

Defendant had no part in these fraudulent practices. It was
43 through no wrong or fault of his that she was induced to

part with it. Knowing as we do how land scrip passed in the market, the only fair understanding of the facts as disclosed by the bill is that this scrip was wrongfully obtained from Sophia Felix and placed on the market, and that defendant, seeking scrip wherewith to enter this land, found and purchased this. He took it to use for himself and not for her, so that none of the elements of an express trust enter into the transaction. Whether by reason of his knowledge of the fact that the scrip was inalienable, and therefore still the property of Sophia Felix, a constructive trust arose, it is scarcely necessary to determine. There are some authorities which would seem to deny the existence of any trust under the circumstances as disclosed. Thus in Perry on Trusts, vol. 1, p. 144, it is said: "But if one who stands in no fiduciary relation to another appropriates the other's money and invests it in real estate or other property, no trust results to the owner of the money." Also see Hawthorne *vs.* Brown, 3 Sneed, 463; Ensley *vs.* Ballentyne, 4 Humphreys, 233; Doyle *vs.* Murphy, 22 Ill., 502; Steele *vs.* Clark, 77 Ill., 471; Weer *vs.* Gand, 87 Ill., 490; Garvey *vs.* Jarvis, 46 N.Y., 310; Dickson *vs.* Caldwell, 15 Ohio State, 412; Cannell *vs.* Drake, 4 Ired. Eq., 94.

Still it must be conceded that other authorities tend in the opposite direction and would hold this to have been a constructive trust; but in such cases equity will recognize the defense of laches and staleness of claim under proper circumstances, and this is a case where it seems eminently proper to recognize and enforce such a defense. Under ordinary circumstances it does not seem probable that any one would seriously contend that a claim so stale could be enforced, or that equity would take property, which had increased so enormously in value, after this lapse of time and give it to parties who have done nothing towards such enhancement of value.

44 But it is earnestly contended that a different rule should be applied in this case, because plaintiffs and their ancestors were Indians; that the law is very tender in respect to the rights of such persons, who are not familiar with our laws and methods of transacting governmental or private business and were ignorant of the disposition which had been made of the scrip; and it is also urged that as Indians they were the wards of the Government and could not have asserted their rights to the property even if they had known what their rights were.

It is not shown that they were not persons of education and intelligence, or that they were not in fact familiar with the land laws and the methods of governmental business, or that they were not in fact as competent to look after their rights as any. We all know that many of these Indians, especially the half-breeds, are well educated, intelligent, and as fully competent to look after their business affairs as any persons; and the fact that they were Indians and maintaining the tribal relations and were in a certain sense the wards of the Government did not debar them from a hearing in the courts of Nebraska. The thirteenth section of the bill of rights of this State reads as follows:

"SEC. 13. All courts shall be open, and every person, for any in-

jury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay."

"Every person" is its language; so that the doors of the courts of this State were open to these plaintiffs as well as to any other person who had or thought he had any claims to property within this State. As a matter of fact, Indians are frequent suitors in the courts of the various States. I recall three cases in the supreme court of my own State, Kansas, and have no doubt there
45 were many more. In Swartzel *vs.* Rogers, 3 Kansas, 374, a suit to establish title to a half interest in certain lands and for partition was maintained by an Indian.

In Blue Jacket *vs.* Johnson County, 3 Kansas, 299, an action was maintained by one of the chiefs of the Shawnee nation to restrain the taxation of his lands, and in Wiley *vs.* Keokuk, 6 Kansas, 94, an action for false imprisonment was also maintained by an Indian. The second of these cases was taken to the Supreme Court of the United States. The Kansas Indians, 5 Wallace, 737. While the judgment of the Supreme Court of Kansas was reversed the right of the Indian to sue in the courts of the State was not questioned. Indeed, it was impliedly recognized, for the court say: "It is argued because the Indians seek the courts of Kansas for the preservation of rights and the redress of wrongs, sometimes voluntarily and in certain specified cases by direction of the Secretary of the Interior, that they submit themselves to all laws of the State." Further, the Revised Statutes, in section 2126, carries the same implication. It reads: "In all trials about the right of property in which an Indian may be a party on one side and a white person on the other, the burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

At any time during the last twenty-seven years these plaintiffs or their ancestors could have come into the courts of Nebraska and asserted their rights, and as this scrip was of value simply for the entering of lands, they could at any time, by examining the records at Washington, have ascertained whether it had been used and by whom and where the land for which it had been used was located. The means of knowledge were open before them. They had the right to sue and the courts would have given them full pro-
46 tection. It would savor little of equity to permit them to come in now and take from these many defendants, most of whom are innocent of any intentional wrong, property of such enormous value on the ground that their ancestor twenty-eight years ago was swindled out of scrip of such trifling value. A million dollars to-day for one hundred and fifty dollars twenty-eight years ago! I cannot believe that equity demands or even tolerates this.

The demurrer will be sustained.

In the Circuit Court of the United States for Nebraska.

FELIX
vs.
PATRICK.

Submitted on demurrer.

I sat with Judge Brewer and heard the argument on the demurrer to the bill. I looked into the case pretty carefully, with the expectation of preparing a written opinion. I found that my views were in full accord with the expressed views of the circuit judge; but quite recently I accidentally learned, to my great surprise and intense disgust, that one of the numerous real-estate agents in this city had succeeded in selling to an inexperienced member of my family a small portion of the disputed tract or at least a part of the tract held by defendant, the title to most or all of which is in dispute. I think, however, this was done some time before this suit was commenced; but the interest or claim of title, whatever it may be, still existing, may make it improper for me to participate in the decision. In no event would my joining in the decision change the status of the cause or affect the rights of the parties to the suit. I know so little of the sale referred to that I cannot even say to a certainty that I ought not to take further action in the cause.

47 But for reasons stated I shall, at least for the present and until further advised, decline to take other action in the cause.

(S'g'd) ELMER S. DUNDY,
District Judge.

22 Oct., '88.

Upon the back of said opinion appear endorsements in words and figures following, to wit:

No. 167 M. U. S. circuit court, district of Nebraska. Pierre Felix *et al. vs.* M. T. Patrick *et al.* Opinion filed Oct. 29, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the November term of said court, on the 14th day of November, 1888, the following proceedings were had in said case as appears of record on journal N of said court.

In the Circuit Court of the United States for the District of Nebraska.

PIERRE FELIX, ELIZABETH FELIX, LOUIS ROBINETT, HARRIET ROBINETT, DENNIS FELIX, and MARGARET FELIX, Plaintiffs,

vs.

MATTHEWSON T. PATRICK, MARY PATRICK, R. W. CLAYTON, Harry B. Mulford, The Omaha Horse Railway Company, Algernon S. Patrick, John M. Wilson, Elof Nilson, Lewis S. Reed, Josiah S. McCormick, Geo. T. Mills, Calvin H. Frederick, Helen A. Frederick, Frederick H. Davis, George Ann McCormick, The Omaha Real Estate and Trust Co., William A. Gardner, Silden M. Phillips, James T. Houston, Jacob Schreiner, George A. Hoagland, Dennis H. Andrews, Benjamin F. Troxell, Jacob Williams, L. V. Morse, Thos. C. Bruner, Harris & Fisher, O. N. Ramsey, David M. Stewart, John F. Flack, William L. McCague, Julius Peycke, and Anna M. Hayward, Defendants.

This cause coming on to be heard upon the several demurrers of the respective defendants to the bill of complaint of the plaintiffs filed herein, and after hearing the arguments of the
48 counsel, and the court being fully advised in the premises, it is further adjudged and decreed that said demurrers —, and the same are hereby, sustained; and it is further ordered, adjudged, and decreed that the bill of complaint of the complainants be, and the same is hereby, dismissed, and that the defendants herein recover their costs from the complainants, taxed at $—; to which order, judgment, and decree of the court the complainants *therefore*, in open court, in presence of the solicitors for defendants, pray an appeal, which is hereby allowed and their cost bond fixed at $250.00.

DAVID J. BREWER,
Circuit Judge.

Thereupon, afterwards, to wit, at the November term of said court, on the 20th day of December, 1888, the following proceedings were had in said case as appears of record, Journal N of said court:

PIERRE EELIX, ELIZABETH FELIX, LOUIS ROBINETT, HARRIET ROBBINETT, DENNIS FELIX, and MARGARETT FELIX, Complainants,

vs.

MATTHEWSON T. PATRICK, MARY PATRICK, R. W. CLAYTON, HARRY B. Mulford, The Omaha Horse Railway Company, Algernon S. Patrick, John M. Wilson, Elof Nilsson, Lewis S. Reed, Josiah S. McCormick, Geo. T. Mills, Calvin H. Frederick, Helen A. Frederick, Frederick H. Davis, George Anna McCormick, The Omaha Real Estate and Trust Company, William A. Gardner, Tilden A. Phillips, James T. Houston, Jacob Schriener, George A. Hoagland, Dennis H. Andrews, Benjamin F. Troxell, Jacob Williams, L. V. Morse, Thos. C. Bruner, Harris & Fisher, O. N. Ramsey, David M. Stewart, John F. Flack, William L. McCague, Julius Peycke, and Anna M. Haywards, Respondents.

This day come the complainants herein, by J. C. Cowin, of counsel with complainants, and make application to this court for leave to

file an affidavit herein showing the amount in controversy in this suit for the purpose of perfecting an appeal as heretofore allowed herein, and upon consideration it is ordered that complain-
49 ants be allowed to file such affidavit; and thereupon, in open court and in presence of the solicitors for respondents, the complainants renew their prayer for an appeal herein and pray an appeal, and, it appearing to the court that the amount in controversy herein, exclusive of costs and interest, exceeds the sum of five hundred thousand dollars, the appeal is allowed as prayed for, and the bond and surety fixed at the sum of two hundred and fifty dollars; and thereupon the complainants file their said bond in the sum of two hundred and fifty dollars, with sufficient surety, and which bond is approved by the court.

We agree that Judge Dundy may make the above order.

December 21, 1888.

JNO. L. WEBSTER,
Atty's for Respondents.
J. C. COWIN,
Sol. for Complainants.

(S'g'd) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to wit, on the 21st day of December, 1888, an affidavit and bond were filed in said case; which said affidavit and bond are in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

PIERRE FELIX, ELIZABETH FELIX, LOUIS ROBINETT, HARRIET ROBINETT, DENNIS FELIX, and MARGARET FELIX, Complainants,

vs.

MATTHEWSON T. PATRICK, MARY PATRICK, R. W. CLAYTON, Harry B. Mulford, The Omaha Horse Railway Company, Algernon S. Patrick, John M. Wilson, Elof Nilsson, Lewis S. Reed, Josiah S. McCormick, Geo. T. Mills, Calvin H. Frederick, Helen A. Frederick, Frederick H. Davis, George Anna McCormick, The Omaha Real Estate & Trust Company, Wm. A. Gardner, Tilden M. Phillips, James T. Houston, Jacob Schreiner, George A. Hoagland, Dennis H. Andrews, Benjamin F. Troxell, Jacob Williams, L. V. Morse, Thos. C. Bruner, Harris & Fisher, O. N. Ramsey, David M. Stewart, John F. Flack, William L. McCague, Julius Peycke, and Anna M. Hayward, Respondents.

50 UNITED STATES OF AMERICA, } ss:
State of Nebraska, Douglas County, }

J. C. Cowin, being first duly sworn, deposes and says that he is of counsel for the above-named complainants; that he is a resident and citizen of the city of Omaha, county of Douglas and State of Nebraska, where he has continually resided for twenty years last past; that he is and for several years last past has been acquainted with the value of real estate in the city of Omaha.

Affiant further saith that he is well acquainted with the real estate the subject-matter of the controversy in this action and the value thereof, and says that at the time of the commencement of the above-entitled suit the property described in the complainants' bill herein, the subject-matter of controversy herein, at the time of this suit was, ever since has been, and now is of the value of more than five hundred thousand dollars, and that the sum, value, and amount in controversy in this action exceeds, exclusive of costs and interests, five hundred thousand dollars.

J. C. COWIN.

Subscribed in my presence and sworn to before me this 21st day of December, 1888.

E. D. FRANK, *Clerk.*

Upon the back of said affidavit appear endorsements in words and figures following, to wit:

No. 167, Doc. M. U. S. circuit court, district of Nebraska. Pierre Felix *et al. vs.* Matthewson T. Patrick *et al.* Affidavit of J. C. Cowin. Filed Dec. 21, 1888. Elmer D. Frank, clerk.

51 Know all men by these presents that we, Pierre Felix, Elizabeth Felix, Louis Robinett, Harriett Robinett, Dennis Felix, and Margaret Felix, as principals, and J. H. Millard, as surety, are held and firmly bound unto Matthewson T. Patrick, Mary Patrick, R. W. Clayton, Harry B. Mulford, The Omaha Horse Railway Company, Algernon S. Patrick, John M. Wilson, Elof Nilsson, Lewis S. Reed, Josiah S. McCormick, Geo. T. Mills, Calvin H. Frederick, Helen A. Frederick, Frederick H. Davis, George Anna McCormick, The Omaha Real Estate and Trust Company, Wm. A. Gardner, Tilden M. Phillips, James T. Houston, Jacob Schreiner, George A. Hoagland, Dennis H. Andrews, Benjamin F. Troxell, Jacob Williams, L. V. Morse, Thos. C. Bruner, Harris & Fisher, O. N. Ramsey, David M. Stewart, John F. Flack, William L. McCague, Julius Peycke, and Anna M. Hayward in the full and just sum of two hundred and fifty dollars to be paid to the said respondents, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at the circuit court of the United States for the district of Nebraska, in a suit depending in said court between Pierre Felix, Elizabeth Felix, Louis Robinett, Harriet Robinett, Dennis Felix, and Margaret Felix, complainants, and Matthewson T. Patrick, Mary Patrick, R. W. Clayton, Harry B. Mulford, The Omaha Horse Railway Company, Algernon S. Patrick, John M.

Wilson, Elof Nilsson, Lewis S. Reed, Josiah S. McCormick,
52 Geo. T. Mills, Calvin H. Frederick, Helen A. Frederick, Frederick H. Davis, George Anna McCormick, The Omaha Real Estate and Trust Company, Wm. A. Gardner, Tilden M. Phillips, James T. Houston, Jacob Schreiner, George A. Hoagland, Dennis H. Andrews, Benjamin F. Troxell, Jacob Williams, L. V. Morse, Thos. C. Bruner, Harris & Fisher, O. N. Ramsey, David M. Stewart, John F. Flack, William L. McCague, Julius Peycke, and Anna M. Hayward, respondents, a decree was rendered against said complainants, and the said complainants at the time of the rendering of said decree and in open court and in presence of counsel for respondents having prayed an appeal, and which appeal was by the said circuit court then and there allowed, and bond being then and there by the court fixed at the sum of two hundred and fifty dollars, and which appeal afterwards in same manner allowed:

Now, the condition of the above obligation is such that if the said complainants shall prosecute their appeal to effect and answer to all damages and costs if they shall fail to make their said plea good, then the above obligation to be void; else to remain in full force and virtue.

PIERRE FELIX, [SEAL.]
ELIZABETH FELIX, [SEAL.]
LOUIS ROBINETT, [SEAL.]
HARRIETT ROBINETT, [SEAL.]
DENNIS FELIX, [SEAL.]
MARGARET FELIX, [SEAL.]
By J. C. CORWIN, [SEAL.]
Their Solicitor.
J. H. MILLARD.

Approved 21 Dec., 1888.
ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear endorsements in words and figures following, to wit:

No. 167, Doc. M. U. *U.* circuit court, district of Nebraska. Pierre Felix *et al. vs.* Matthewson T. Patrick *et al.* Appeal bond. Filed Dec. 21, 1888. Elmer D. Frank, clerk.

53 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for the eighth circuit and district of Nebraska, do hereby certify that the foregoing folios from one to 53 contain true and faithful transcripts of all pleadings and proceedings of record and on file in my office as said clerk and the whole thereof and the endorsements thereon in the case of Pierre Felix *et al. vs.* Matthewson T. Patrick *et al.*

Witness my hand and the seal of said circuit court, at Omaha, this 21st day of December, A. D. 1888.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Case No. 13,453. Nebraska C. C. U. S. No. 301. Pierre Felix, Elizabeth Felix, Louis Robinett, Harriet Robinett, Dennis Felix, & Margaret Felix, appellants, *vs.* Matthewson T. Patrick, Mary Patrick, R. W. Clayton, Harry B. Mulford, The Omaha Horse Railway Company, Algernon S. Patrick, *et al.* Filed December 27, 1888.

Office Supreme Court U. S.
FILED.
APR 2 1892
JAMES H. McKENNEY,
CLERK.

CASE No. 13,453.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. 301.

PIERRE FELIX, ELIZABETH FELIX, LOUIS ROBINETT, HARRIET ROBINETT, DENNIS FELIX, AND MARGARET FELIX, APPELLANTS,

vs.

MATTHEWSON T. PATRICK, MARY PATRICK, R. W. CLAYTON, HARRY B. MULFORD, THE OMAHA HORSE RAILWAY COMPANY, ALGERNON S. PATRICK, ET ALS., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Special Brief for Appellants by

WM. D. SHIPMAN,

Of Counsel for the Appellants

Supreme Court of the United States,

OCTOBER TERM, 1891.

TERM NO. 301.

PIERRE FELIX *et als.*		
vs.		In Equity.
MATTHEWSON T. PATRICK *et als.*		

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Special Brief for the Appellants.

As the general brief filed by the leading counsel for the appellants contains a full statement of facts as alleged in the bill and admitted by the demurrer, it is unnecessary to repeat them here.

But the case is so important, and, in some essential points, so peculiar, that this Court will very properly require a somewhat full discussion of the main questions involved in the controversy.

I.

The first question to be considered is the state of the record title to the land in question.

As one of the objects of this bill as set forth in the allegations and prayer thereof is to secure a decree of the Court declaring the alleged muniments of title under which the principal defendant, Matthewson T. Patrick, claims to hold and own the property in question null and void, and ordering them cancelled and removed as a cloud on complainants' title, it is proper to examine their character at the outset. As one step in this direction these documents should be scrutinized in the condition they were at the time Patrick obtained them, as well as in their subsequent history.

The first of these papers is Exhibit A, attached to the bill, and according to the allegations of the latter, admitted to be true by the demurrer. This instrument was in the following form:

"KNOW ALL MEN BY THESE PRESENTS, that we, David "Garnell and Sophia Garnell, late Sophia Felix, his wife, "of Mendota, County of Dakota, State of Minnesota, have "made, constituted and appointed, and by these presents "do make, constitute and appoint

" our true and lawful "attorney for us, and in our name, place and stead, to "grant, bargain, sell and convey and confirm unto the "purchaser thereof, the following described piece or pieces "or parcels of land to be located for us and in our name "by said scrip number

" it being Sioux half-breed Lake Pepin Reserve scrip. Said " land described as follows, to wit:

" And on such sale for us and in our name to execute " and deliver to any purchaser thereof a good and sufficient " deed therefor, hereby ratifying and confirming whatso- " ever our said attorney or his substitute shall lawfully " do or cause to be done in the premises, hereby binding " ourselves not to revoke this power of attorney.

" Witness our hands and seals this thirty-first day of " March, 1860.

" Signed, sealed and delivered in the presence of

	his
" W. H. McCollum.	David X Garnell.
	mark.
	her
" E. C. Lambert.	Sophia X Garnell
" B. A. D. Young.	mark."

This paper purports to have been acknowledged on the same day by McCollum, one of the witnesses to it, and a notary public.

Nearly a year and three months afterwards the Secretary of State of Minnesota appears to have certified to this notary's official character.

The next date in connection with it is September 7, 1863, on which day it is stated to have been recorded.

It will be noted that this paper is a mere skeleton. It contains no name as the attorney, nor the least description or designation of any land whatever. On the contrary, its language implies that the alleged grantees had no land. It speaks of " land to be located for us, and in our name,

by *said scrip.*" No scrip had been described or designated to which the word "said" could apply. Neither the town, county, State, or Territory in which the location was to be made is named. It may not be absolutely demonstrated by the bill precisely when this skeleton was filled up in pursuance of the fraudulent scheme averred in the bill and admitted by the demurrer; but it is fairly inferrible, that it was at or about the time when the warranty deed (Exhibit C, Record, p. 16) was fabricated. The date of the latter is July 25, 1863.

The question at once arises whether this paper when it was executed had any legal force as a power of attorney to authorize the conveyance of the land in question, or could thereafter be endowed with any such force, by any person or persons other than David and Sophia Garnell, by whom it purports to have been signed. It purports to have been "signed, sealed and *delivered*" in presence of three witnesses. Delivered to whom? It could not have been delivered to an attorney, for no attorney was named in it. But the character of this paper will be considered hereafter.

The next paper (Exhibit B, Record, p. 14) relating to the title, is as follows:

"KNOW ALL MEN BY THESE PRESENTS, That David "Garnell and Sophia Garnell, late Sophia Felix, his wife, "of Mendota, in the county of Dakota, and State of "Minnesota, in consideration of the sum of one dollar to "them in hand paid by

"the receipt of which is hereby acknowledged, have bar- "gained, sold and quit-claimed, and by these presents do "bargain, sell and quit-claim unto the said

" his heirs and assigns forever all their right, title,
" interest, claim or demand which they now have or may
" hereafter acquire in and to the following described
" pieces or parcels of land situate and being in

" to have and to hold the above quit-claimed premises
" with all the privileges and appurtenances thereto belong-
" ing to the said

" his heirs and assigns forever so that neither they or
" either the said David Garnell or Sophia Garnell his
" wife, them or either of their heirs or assigns, or any
" person claiming by or under them, or either of them
" shall have any right, title, interest or demand in the
" aforesaid premises.

" In Witness Whereof, we have hereunto set our hands and seals, the 31st day of March, A. D., 1860.

his
David X Garnell.
mark
her
Sophia X Garnell.
mark

" Signed, sealed and delivered

" W. H. McCollum.
" B. A. D. Young."

This paper purports to have been acknowledged the same day as Exhibit A., before McCollum, the notary, whose official character was certified to on the 8th of June, 1861.

Exactly when this skeleton was filled up does not appear but it purports to have been recorded September 7, 1863, some six weeks after the execution and record of the alleged deed from Ruth (Exhibit C, Record pp. 16 and 17), to Patrick. Of course, it was filled up before it was recorded.

I submit that this pretended quit-claim deed and power of attorney never had any legal force whatever, but were, at all times and are now absolutely null and void. All the effect either could have, when filled up, was to cast a cloud on the title to the land located in the name of Sophia Felix, and secured to her by the patent of the United States (Exhibit D, Record pp. 17 and 18), issued on the 3d of July, 1863.

First.—In regard to the quit claim deed.

In the first place no grantee was named in the deed, nor any description of or allusion to any person who could be ascertained as such grantee.

The subject of the necessary parties to a deed in order to give it validity is discussed at length by Washburn in his Treatise on Real Property, and the authorities are cited at length (Vol. 3, 5th Ed., Secs. 26, *et seq.*). His conclusion (sec. 26), is thus stated: "And it may be laid down as a rule, that a grant, to be valid, must be to a corporation or some person certain named, who can take by force of the grant, and who can hold either in his own right or as trustee."

The foregoing observations apply equally to the subject of the grant. Kent's Comm. 13 ed. Vol. 4 p. 460. It must be described or the instrument is no deed.

It appears by the certificate of the notary who took the acknowledgment that it was *delivered* at the time of execu-

tion, viz., March 31st, 1860, though to whom does not appear. There was no subsequent delivery, after the blanks were filled, so that that class of cases which hold that when a blank is left in a deed and the agent of the grantor is authorized by him to fill it and does so and then delivers it the deed is valid, has no application to this case. As was said by the Supreme Court of Mass. in *Burns and wife* vs. *Lynde*, (6 Allen 305, 311): "When the paper was delivered it had no validity or meaning, The filling up of the blanks created the substantial parts of the instrument itself; as much so as the signing or sealing." But we do not apprehend that there can be any difference of opinion as to whether a mere skeleton of a paper having no name of the grantee therein, or any designation by which he can be identified; nor the mention or description of any property to be conveyed, can be of any validity whatever. Nor can the filling of the blanks with the essential elements of a deed by any one after delivery, give the paper efficacy to transfer the title to lands, the description of which is then inserted. A deed is a contract between parties, and must have a subject matter, and a consideration. This paper has no such attributes. This pretended quit-claim deed is a nullity, but in the form in which it was placed on record it constitutes a cloud on the title and should be swept away. Even if this quit-claim deed had been in all respects complete in form, the subsequent title acquired by the grantor would not have been transmitted through it to the grantee.

Tillotson vs. *Kennedy*, 5 Ala., 407

Second.—The pretended power of attorney executed and delivered at the same time this deed was, is equally void. It was, evidently, like the quit-claim deed, filled up long after it was delivered. Indeed, it must have been, for when it was delivered the scrip had not been located and therefore there was no land in which the grantors had even an inchoate interest which could be described.

The bill alleges, and of course the demurrer admits, that Patrick secured possession of these skeleton papers and the scrip in November 1861, more than a year and eight months before this power of attorney and quit-claim deed were delivered, and that he soon after had them filled up. The remark of the Supreme Court of Mass. in *Burns and wife* vs. *Lynde* already cited is as applicable to this blank power of attorney as to the blank quit-claim deed. "When it was delivered it had no validity or meaning. The filling up of the blanks created the substantial parts of the instrument itself; as much so as the signing and sealing."

Third.—The next alleged instrument of title to be considered is the warranty deed, purporting to be executed by the man Ruth, assuming to act under the power of attorney. This paper is printed in the record as Exhibit C, p. 16, and is dated July 25, 1863. *In the meantime the patent for the land had been issued to Sophia Felix, as it could have been issued to no one else.* It vested a complete title in her. Patrick then proceeded to consummate the fraud. He had the pretended power of attorney filled up with a description of the land and the name of Ruth as the attorney, and the latter proceeded to execute a warranty deed to Patrick in the name of the owner and her husband. This was done, apparently, as soon as the patent reached Patrick at Omaha, for the latter is dated at Washington, July 3, 1863, and the warranty deed on the 25th of July, 1863, and recorded on the same day. On the 7th of September following, this power of attorney and the quit-claim deed were also put on record.

Of course, the power of attorney being void for inherent defects of the most glaring character, the deed which Ruth executed is equally void (*Clark* vs. *Graham*, 6 Wheaton, 577). The power was not only void for the want of any name or designation of any person as attorney, but, like

the quit-claim deed, for want of any description of the land which was the subject matter of the power.

Even if the attorney had been named in the power, and the grantee in the quit-claim deed, and the land described in both instruments, they would still both have been void, for the obvious reason that the grantors owned no such land, or had even an inchoate title thereto. *Nichols* vs. *Nichols* (3 Chandler, Wisc. Rep. p. 189). The fact that the power refers to "land to be located for us," and the quit-claim to the interest in land "which they (the grantors) may hereafter in any way acquire" do not help the matter. Both these papers would still be void even had the attorney been named in the power and the premises described in both. It was a mere possibility, or at most an expectancy, which was referred to; and such a shadowy possibility, hope, or expectation cannot be the subject of a conveyance. *Lamb* vs. *Kamm* (1 Sawyer, p. 238). In that case the deed purported to convey all the right, title or interest in the real property described in the deed, "whether in possession or expectancy." In disposing of the case, the Court, Deady, J., said: "On the argument, counsel for "the defendant sought to give some special signification "to the word *expectancy* as indicating a sale or disposition "by the deed of any interest in the premises which the "grantors might then for any reason *expect to acquire in* "*the future*. But no such effect can be given to the word. "Although, when a deed contains proper covenants, an "after acquired estate in the property may pass to the "grantee by operation of such covenants, yet no estate in "real property can be bargained, sold, or released before "it is acquired by the grantor."

Allen vs. *Withrow*, 110 U. S., 119, 129.

In is unnecessary to repeat that the pretended power of attorney being void the warranty deed purporting to be executed by virtue of it falls with it, and the title to

the property remains in Sophia Felix where the patent of the U. S. vested it on the 3d of July, 1863.

Patrick, the principal defendant, no doubt realized this and so attempted to acquire a title in some other way. In the month of September, 1863, he had David Garnell and his wife approached for the purpose of securing a title directly from them, at the same time instructing his agent to "have the feeler thrown out without giving the parties any particular information" (Exhibit E. Record p. 18). This scheme appears to have failed. The title, both legal and equitable therefore, still remained in Sophia Felix, under the patent granted to her. It remains there still, or rather in her heirs at law who are the complainants in the present bill, unless she or they have parted with it, or it has been taken from her or them, in some other way.

II.

The attempt of Patrick the principal defendant to get a title through two acts of Congress.

The history of this attempt is sufficiently disclosed in the acts themselves, and the debates thereon when they were passed, and, for convenience I insert these statutes here.

First.—The act of July 25, 1868 (15 U. S. Stats. at Large p. 186) which is as follows:

Chap. CCXL. An Act to confirm the title to certain lands in the State of Nebraska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in all cases in which the Commissioner of the General Land Office, or the Secretary of the Interior, has

finally decided in favor of preemption settlers or the locators of Indian or half-breed scrip, and issued patents to them for lands within the corporate limits of the city of Omaha, in the State of Nebraska, the right and title of the patentee or patentees shall not be defeated or impaired because such land was within the said corporate limits, but if good in every other respect the title shall be good and valid, notwithstanding such lands may have been within the said corporate limits, and notwithstanding the entry thereof, by any preemptor, or locator of Indian or half-breed scrip, was forbidden by the tenth section of the act of September fourth, eighteen hundred and forty-one, because so within said limits: provided that the following tracts of lands, to wit: the north half of the northwest quarter of section fifteen; the west half of the southwest quarter of section ten; the east half of the southeast quarter and the northwest quarter of the southeast quarter of section nine, township fifteen north of range thirteen, east of the sixth principal meridian, are hereby excepted from the operation of this act.

Approved, July 25, 1868.

The second Act (February 2, 1869, U. S. Statutes at large, p. 269), is as follows:

Chap. XXI.—An act supplementary to an act, entitled "An act to confirm the titles to certain lands in the State of Nebraska."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and benefits of an act, entitled "An Act to confirm the titles to certain lands in the State of Nebraska," approved the twenty-fifth day of July, Anno Domini eighteen hundred and sixty-eight, be, and the same are hereby, extended to the east half and northwest quarter of the southeast quarter of section nine, township fifteen,

range thirteen east, sixth principal meridian, in Douglass county, Nebraska, *and that the title to the same is hereby confirmed to the parties holding by deed from the patentee.*

Approved February 2, 1869.

(I have put in italics the significant part of this last act).

It should be remarked here that Senator Pomeroy was in error when, in speaking of the land excepted out of the first act and included in the second act, he said it embraced only forty acres. It embraced one hundred and twenty acres, and covered all the land to which this controversy relates. For the purpose of elucidating this point the following diagram may be useful.

(Diagram showing section nine (9), township fifteen north, range thirteen (13), east sixth (6th) principal Meridian, Douglas county, Nebraska.)

Each quarter section in all such United States surveys contains one hundred and sixty acres. The land in controversy is in section 9 (Record, p. 3, folio 4), as will be seen by reference to the patent (Exhibit D attached to the bill, Record, p. 17). It covered ¾ of the southeast quarter of section 9.

The first act above *excluded* this one hundred and twenty acres from its operation. The second act *included* them.

This last act also went further than the first, and added, "*And that the title of the same is hereby confirmed to the parties holding by deed from the patentee.*"

It is too obvious to require remark that the sole object sought by procuring the passage of this last act in this form, was to give some color of validity to the title which had been attempted to be gained by the deed of Ruth acting under his pretended power of attorney to Patrick of the land in question. Though the act was in form a public one, it was sought in this part of it to accomplish a private object. The question arises here as to the effect of that portion of the last act above cited on the title of this land.

I trust that it is unnecessary to discuss such a question as this before this Court at any length. If Patrick got no title by virtue of the alleged deeds, this act could give him none. In *Loan Association* vs. *Topeka* (20 Wall., 664), Mr. *Justice Miller*, in delivering the opinion of this Court, remarked: "To lay with one hand the power of the Gov-" ernment on the property of the citizen, and with the other " bestow it upon favored individuals to aid private enter-" prises and build up private fortunes, is none the less " robbery because it is done under the forms of law and is " called taxation. *This is not legislation. It is a decree* " *under legislative forms.*"

This legislation, by which it is claimed that Patrick was vested with the title to these lands, is not covered even by the thin veil of taxation. In this aspect it is a naked and arbitrary decree by which it is sought to divest these complainants of a title derived from the United States, and to vest that title in the defendant Patrick. The effect sought to be given to this part of the act is not to cure any defect in the location of the land or in the patent of the United States which vested the title in Sophia Felix, but to confirm the pretended title

attempted to be conveyed to Patrick by the spurious deed of Ruth to him. The latter was no deed, except in mere form, and conveyed no title to Patrick, so that the effect claimed for the act of the appellees, is to *transfer the title* of the patentee to Patrick. This, it is confidently submitted, was not a function of legislation, and was wholly beyond the power of Congress.

It is hardly decorous to pursue the discussion of this point before this Court, though two observations may be made here. First that Patrick was perfectly conscious that he had acquired no title by his spurious deeds; and second that he *hoped* to get one, or some advantage in a controversy about the title whenever one was sprung on him.

III.

The present condition of the record title to this land, and the relation of the defendant Patrick to it, and the appellants in this case.

The bill alleges (Record, p. 3, fol. 4), "that the said "Matthewson T. Patrick in securing possession of said "scrip procured the same with intent to appropriate the "scrip to his own use and defraud the said Sophia Felix "out of the same and out of all interest therein and out "of all benefits thereunder, and located the same, design-"ing it for his own use and benefit and with the fraud-"ulent intent to deprive the said Sophia Felix of all ben-"efit and interest therein."

This is an allegation of a fact coupled with an intent. Of course it is expressly admitted by the demurrer.

In locating this scrip and receiving the patent therefor

Patrick could only act in the name of Sophia Felix and as *her* agent or trustee. The law charges him with assuming that fiduciary capacity, though the principal was ignorant of his acts. He could, down to the reception of the patent, act in no other capacity, notwithstanding his fraudulent intent to ultimately secure the land for his own use and benefit. The scrip was not assignable. Such assignment was expressly made invalid by the act authorizing its issue. The patent could alone issue to what is termed the scripee, who in this case was Sophia Felix, the person from whom the title passed at her decease, intestate and leaving no lineal descendant, to these appellants.

The patent was issued to her July 3, 1863 (Record, p. 18, fol. 29). The clear legal and equitable title was then and thus vested in her.

But to consummate the fraud which Patrick had been for years pursuing, it was necessary to secure, if possible, that title to be transferred to him. He was careful not to apply to the patentee who was in profound ignorance of his acts, which he had concealed from her. His plan required secrecy, and he was anxious that neither she nor her husband should have any information of his doings (Record, Ex. E. p. 18, fol. 30). See also the allegations of the bill (Record, p. 5, fol. 7).

It will be kept in m nd that the patent is dated July 3, 1863. In due course, through the routine of the General Land Office at Washington, and the mail, or by special messenger, it would naturally be some time before it reached Omaha, but hardly more than about three weeks. There can be no doubt that, as soon as it reached that place, the pretended deed of Ruth was executed and delivered to Patrick. This deed is dated July 25, 1863 (Record, p. 16, fol. 26). It was recorded the same day. It is admitted that the patent was filed for record on or about the same day (Record, p. 8, fols. 13 and 14).

Patrick was some time before this in possession of this land, but as a trespasser, without title, legal or equitable

(Record, p. 4, fol. 6). Not being successful in his attempts to obtain title and lawful possession for himself, he undertook to accomplish his purpose by the scheme of fraud disclosed in this Record. He therefore got hold of this scrip, located it, had the patent issued to Sophia Felix, and then procured his tool Ruth, to execute a warranty deed to him, as above stated, and, on the 7th of September, he had both the pretended power of attorney and the quit-claim deed recorded. Thenceforward he has held possession of this land under such color of title as these fraudulent and spurious documents seemed on their face to give him. Now, what is the relation which he assumed in the eye of the law as administered by Courts of Equity, by this series of acts, and the declarations which he *must* have made while performing them? The answer to this question will be found under the following head:

IV.

He was, from the time he assumed the control of the scrip down to the present time, and still is, the trustee of the rightful owners.

First.—He, and no one else, had exclusive possession of this scrip. He held that possession for the rightful owner or scripee. He had no interest in it. He presented it to the land office for her and in her own name. He had it located for her and in her own name. He obtained the patent for her in her own name. Not only his acts, but his declarations show that he was acting in a fiduciary character for the owner of the scrip.

I say "declarations" as well as acts; for he could have neither located the scrip, nor obtained the patent, except

by expressly assuring the Land Office that he was acting, not for himself, but for the true owner.

He therefore assumed this fiduciary relation under circumstances which constituted him a trustee under what was equivalent to an express trust. That he did this voluntarily, without the knowledge of the scripee, and with intent ultimately to defraud her, does not relieve him of the responsibilities of his fiduciary relation.

The character of this scrip, impressed upon its face, in accordance with the statute under which it issued, rendered it impossible that any one could obtain any interest in it by purchase or assignment. Whoever held and located it, and secured the patent, could only act in behalf of the person to whom the scrip and patent issued. The law charges one thus dealing with it as undertaking the execution of an express trust in behalf of the person to whom, and for whose benefit, it was issued. *Otherwise the very object of the statute in rendering invalid any transfer of the scrip, would be defeated.* This express trust is, to use the language of jurists, "manifested" by the scrip itself, by the statute under which it was issued, by the language of the skeleton power of attorney which was in the possession of Patrick, and by his acts, and the declarations which he *must* have made to the Land Office when he made the location and secured the issue of the patent.

"It is said that no evidence can be admitted for the purpose of engrafting a parol trust on an instrument which purports to be on its face an absolute gift. But the objection is not to the creation of the trust by parol, but to the manner of *proving* it. Therefore, if it can be legally made to appear that the donee took in trust, equity will enforce it."

Tiffany & Bullard on the Law of Trusts and Trustees, pp. 14 and 15, Ed. of 1862.

And the same authors say (p. 14): "The Statute for the Prevention of Frauds (29 Car. II, Chap. 3, Sec. 7), did not

prohibit the creation of trusts of realty by parol, but required that they should be 'manifested and proved by some writing, signed by the party who is by law enabled to declare such trust.' Such is the construction which has been put upon it. An examination of the cases will show that courts of equity are intent in carrying out the legal intention of the donor, devisor or grantor, to uses and trusts, where that intention can be clearly *ascertained*, whether the trust affecting realty is raised by written or parol declaration ; and they will not be restrained in the execution of the trust any further than the positive prohibitions of the statute require."

It must be conceded that the present case is peculiar. The United States, both by statute and by the terms of the scrip which it issued, made it impossible for any one to deal in any manner with the scrip, except as trustee for the owner. Such a person, locating the scrip and securing the issue of the patent, must be charged with acting in that fiduciary capacity.

Now a trustee, whether under an express or an implied or constructive trust, cannot throw off the obligation which the trust imposes. If he is acting without the knowledge of his principal he must apprise him of what he has done. This scrip was held by Patrick as trustee for the owner, Sophia Felix. He was bound to use it for her benefit. If it had been so much cash received from her which he undertook to invest in land in her name, he would have been under obligation to notify her of the disposition he had made of it. Without so doing he could not discharge his whole duty as trustee, but his obligation would still continue till he had done so. He would continue in the character of trustee, and under the responsibilities and disabilities which that relation imposes.

Now, what did Patrick do when he had obtained the patent and so executed the trust thus far ? Did he notify his principal? By no means. He proceeded to consum-

mate his fraudulent scheme by securing the pretended transfer of the land to himself by filling up a skeleton power of attorney with a description of the land and with the name of Ruth, and by causing the latter to execute and deliver to him a warranty deed of the land embraced in the patent. And, it should be noted, that this skeleton power of attorney referred only to "land to be located *for us* and in our name."

It is true, the learned Judge who delivered the opinion of the Court below remarked (Record, p. 27, fol. 43) that Patrick "took it (the scrip) to use for himself and not for her." But we respectfully submit that he was prohibited by statute from making such a use of it. He could only use it for her benefit, as he did, by securing the location of the land in her name, and the patent conveying the title to her, yet leaving her in profound ignorance of what he had done, and then proceeding to obtain a colorable title to it in himself.

Second.—But whether this was technically an express trust or not, there can be no doubt that it was a resulting or constructive trust. The law will not permit a trustee, or even a mere agent, to secure for his own benefit the property, real or personal, of his principal. If he gets it into his possession without the consent of his principal, whether under a colorable title or not, he must return it and account for its use.

"Resulting trusts are trusts that the Courts presume to "arise out of the transaction of the parties, as if one man "pays the purchase money for an estate, and the deed is "taken in the name of another. Courts presume that a "trust is intended for the person who pays the "money."

Perry on Trusts, 3d Ed., Sec. 26.

"A constructive trust is one that arises when a person,

" clothed with some fiduciary character by fraud or other-
" wise, gains some advantage to himself. Courts construe
" this to be an advantage for the *cestui que trust*, or a
" constructive trust."

Ibid., Sec. 27.

The same work (Perry on Trusts, Vol. 1, Sec. 166) amplifies the above definition of constructive trusts, and both the text of the author and the cases he cites show conclusively that Patrick's transactions with this scrip, its location, and the getting of the patent into his possession were such as to charge him with the obligation of, at least, a constructive trustee. He does not relieve himself from that obligation, but rather fastens it on him more firmly, by setting up the claim that, though in form he acted for Sophia Felix, yet in fact he did so in pursuance of a fraudulent intent to vest this property in himself.

Even had Patrick been able by his fraud to secure the issuance of the patent for this land to himself by name, the law would still hold him a trustee for the rightful owner. This Court has delivered some significant opinions directly bearing on this question.

Massie vs. *Watts* (6 Cranch, p. 148).
Meader vs. *Norton* (11 Wallace, pp. 442, 458).
Widdicombe vs. *Childers* (124 U. S., pp. 400, 405).

The core of the decision in *Massie* vs. *Watts*, so far as it relates to this point, is well stated in the syllabus. "If an agent locate land for himself which he ought to locate for his principal, *he is in equity a trustee for his principal.*"

It is true that Patrick, in carrying out his fraudulent scheme, was compelled to have the land located and patented in the name of Sophia Felix. Could he, by the use of her scrip, have located and secured the patent in his

own name he would, according to the decision in *Massie* vs. *Watts*, have been a trustee. Does the fact that, being compelled to have the location and patent made in her name, he then had the land fraudulently conveyed to himself, place him in any different position? Does it make any difference by what link in the chain of fraud he is riveted to the responsibilities which the established principles of equity hold that he assumed?

The case of *Meader* vs. *Norton*, above cited, is in point. In that case certain parties who had obtained a patent of land upon false and fraudulent papers, while the land should have been patented to others, were, though vested with the legal title, declared by the Court trustees for the rightful owner.

In *Widdicombe* vs. *Childers*, also above cited, it was held that a party who had wrongfully obtained a patent of land which in equity belonged to others, though the holder of the legal title, was chargeable as trustee. Mr. Chief Justice Waite in delivering the opinion of the Court (pp. 404, 405), said:

"Widdecombe being a purchaser with full knowledge of their rights, was in law a purchaser in bad faith, and, as their equities were superior to his, they were enforceable against him, even though he had secured a patent vesting the legal title in himself. Under such circumstances, a Court of Chancery can charge him as trustee and compel a conveyance which shall convert the superior equity into a paramount legal title. The cases to this effect are many and uniform. *The holder of a legal title in bad faith must always yield to a superior equity.* As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent was issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons.

Townsend vs. *Greeley*, 5 Wall., 326, 335; *Silver* vs.

Ladd, 7 Wall., 219, 228; *Meader* vs. *Norton*, 11 Wall., 442, 458; *Johnson* vs. *Towsley*, 13 Wall., 72, 87; *Carpenter* vs. *Montgomery*, 13 Wall., 480, 496; *Shipley* vs. *Cowan*, 91 U. S., 330, 340; *Moore* vs. *Robbins*, 96 U. S., 530, 535; *Worth* vs. *Branson*, 98 U. S., 118, 121; *Marquez* vs. *Frisbie*, 101 U. S., 473, 475."

V.

The question of Laches.—Statute of Limitations.—Stale claim in equity.—Adverse possession.

The appellees confront us with the claim that, granting the void character of the pretended deeds to Patrick, and the power of attorney in which he inserted the name of Ruth, and the description of the land, still the appellants are entitled to no relief because they delayed their suit for that relief too long. To this defense we answer.

1. This suit was commenced as soon as the fraud practiced on these appellants, by the disposition attempted to be made of their property, was discovered by them, and that if the appellants had been white persons, their relief would not be barred on account of lapse of time.

2. That the appellants were, from their birth, down to the 29th of August, 1887 (Record, p. 9, fol. 15), TRIBAL INDIANS, under such conditions of wardship, pupilage, constraint, dependence and disabilities, that no statute of limitations, or lapse of time, could run against them or bar their right to relief, while those conditions remained.

First.—The bill alleges that suit was brought as soon as the fraud was discovered (Record, p. 9, folio 15).

But the appellees, under the second head of demurrer (Record, p. 19, folio 32) claim that the appellants did not use due or reasonable diligence in discovering the fraud.

That this defence is without merit or validity will appear by recurring to the statute under which this scrip was issued (10 U. S. at Large, p. 304.)

The language of the Act provides:

"Which said certificates or scrip may be located on any of "the lands within said reservation not now occupied by ac- "tual and *bona fide* settlers of the half breeds or mixed "bloods, or such other persons as have gone into said terri- "tory, by authority of law; or upon *any* other unoccu- "pied lands subject to pre-emption or private sale; or "upon any other unsurveyed lands, not reserved by gov- "ernment, upon which they have made improvements."

"Said reservation" was in Minnesota, on the west side of Lake Pepin, about 400 miles from Omaha; and the range of location outside of this "reservation" covered all other public lands in the United States, but such as are excepted by the terms of the act. It will be borne in mind that no notice was given to Sophia Felix that this scrip had been located at all, much less of the place, or even State or Territory in which it was located. If she had been a white woman, especially an ignorant one who could not write her own name, as the bill shows Sophia Felix was, the law would not impose on her a rule of diligence requiring her to search the Land Offices throughout the vast area of the public lands of the United States to discover what had been done with her scrip; for such a rule would require what would be practically an impossibility. It was the duty of Patrick who had located the scrip in her name

and caused a patent to be issued to her, to notify her, and it is not for him to charge her with laches for not having ranged over thousands of miles, searching the records of numerous Land Offices, to ascertain where the land was that had been set apart for her, and what disposition some swindler like him might have made, or attempted to make, of it. She had not, nor could have, any clue or opening, except possibly the records of the General Land Office at Washington, some 1,300 miles away, and of that source of information, a person who was so ignorant as to be unable to write her own name, would have no more knowledge than a buffalo which roamed the Western plains. Under such circumstances it would be a cruel mockery of justice to allow a fraud like this to ripen into a good title under the shelter of the doctrine of laches or by applying the Statute of Limitations.

I repeat, that a transaction like this, if the victims of the fraud had been white persons, especially if they were ignorant, feeble minded, and living far from the place where the land was situated and the fraudulent scheme enacted, they would not be barred of relief by the time which elapsed in this case before suit was brought.

Michoud vs. *Girod* (4 How., p. 503).

In that case this Court said, "Nor do we think that the complainants have lost their rights by negligence, or by lapse of time. We can only see in their conduct the fears and forbearance of dependent relations, far distant from the scene of the transactions of which they complain." * * * * * *In case of actual fraud*, Courts of Equity give relief after a long lapse of time, much longer than has passed since the executors in this instance purchased their testator's estate. In general, length of time is no bar to a trust clearly established to have once existed, *and where fraud* is *imputed and proved*, length of time ought not to exclude relief" (pp. 550, 560).

And, after stating that within what time a constructive

trust will be barred must depend on the circumstances of the case, the same opinion (p. 560) says: "There is no rule in equity which excludes the consideration of the circumstances, and, in a case of actual fraud, we believe that no case can be found in the books in which a Court of Equity has refused to give relief within the lifetime *of either of the parties upon whom the fraud is proved*, or within thirty years after it has been discovered—or becomes known to the party whose rights are affected by it."

In *Allore* vs. *Jewell* (94 U. S., p. 506), this Court refused to apply a bar of the statute or the doctrine of laches where all the facts were known to the complainant more than six years before he commenced his suit.

See also

Griswold vs. *Hazard* (141 U. S., 260, 288).
Bryan vs. *Kales* (134 U. S., 126, 135).
Trevelyan vs. *Charter* (11 Cl. & Fin., 714).
Malony vs. *L'Estrange* (Beatty, 406).
Carpenter vs. *Canal Co.* (35 Ohio St., 307).
Oliver v Platt (3 How 411)
Reynolds v Sumner (126 Ill. 58)

In *Prevost* vs. *Gratz* (6 Wheaton, 481), Mr. Justice Story in delivering the opinion of this Court (p. 497) said: "It is certainly true that length of time is no bar to a trust clearly established; and in a case *where fraud is imputed and proved*, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a Court of equity to grant ample and decisive relief."

It may be contended by the other side, as it was below, that, granting the appellants had not *actual* knowledge (as the demurrer admits they had not), still they had constructive notice, from the time the void power of attorney and the pretended deed executed in pursuance of the power,

was recorded in Omaha. This claim rests upon no reason or legal foundation.

This pretense that these appellants are chargeable *with constructive notice* of the acts of Patrick by the record of the spurious power of attorney, the quit-claim deed, and the warranty deed executed by Ruth, the tool of Patrick, is effectually disposed of by the following authorities :

A deed executed without the knowledge or assent of the grantor, though signed by him, is a *forgery*.

McGinn vs. *Tobey* (62 Mich., 252), 14 Pacific Rep., 818.

"But we consider this deed clearly a forgery, under the best definitions of that offense. Bishop defines 'forgery' to be 'the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability" 2 Bish. Crim. Law (7th ed.), § 523. It is the 'fraudulent making and alteration of a writing, to the prejudice of another man's rights.' 4 Bl. Comm., 247. The signature to this instrument is genuine, but the body of the deed is false, and the signing of complainant's name, without knowledge of falsity cannot cure it, and make a true and valid instrument in the hands of anyone. A genuine signature cannot change the character of an instrument of this kind, unless the intent to do so goes with the signature," *id.*

"An instrument which passes into the possession of the grantee, without such intention on the part of grantor is wholly inoperative ; and a purchaser from the former acquires in law no title to the property which it purports to convey. It is accordingly held that even a vendee from the grantee, who has paid value without knowledge of the facts, is not an innocent purchaser in such a case. Tisher *vs.* Beckwith, 30 Wisc., 55 ; Everts *vs.* Agnes, 4 Wisc. 356, 6 Wisc., 453 ; Henry *vs.* Carson, 96 Ind., 412 ; Van Amringe

vs. Morton, 4 Whart., 382; Fitzgerald *vs.* Goff, 99 Ind., 28; Stanley *vs.* Valentine, 79 Ill., 548; Harkreader *vs.* Clayton, 56 Miss., 383; Miller *vs.* Fletcher, 27 Gratt., 403.

"The Courts say that a deed delivered without the consent of the grantor is of no more effect to pass title than if it were a forgery. Henry *vs.* Carson, 96 Ind., 412; Hadlock *vs.* Hadlock, 22 Ill., 384."

Steffian vs. *Mitmo Nat. Bank* (69 Texas, 513), 6 S. W. Rep., 824.

In *Stone* vs. *French* (37 Kansas, 145), 14 Pacific Rep., 530, where the grantor had never delivered the deed, it was said:

"This is unlike a case where a deed is only voidable, and a *bona fide* purchaser obtains title from the holder of the same without any notice of its infirmity. In such a case he may obtain a good title; but, where the deed is absolutely void, he cannot. It seems to be admitted that if the deed was forged, that no person could obtain any title under it, however innocent he might be, but a forged deed is no more void than this deed. Both in this respect are precisely alike. Both are equally void."

"Since the constructive notice arising from registration is unknown to the common law, and is entirely a creation of the statute, it is plain that the provisions of the statute must be exactly complied with, or else there will be no resulting notice. Certain requisites are prescribed by the legislation; they are all essential; without them the object of the proceeding would wholly fail. * * * * They relate to the form, execution and contents of the instrument, and to the form and manner of the registration.

"The record operates as a constructive notice *only* when

the instrument itself is one of which the registration is required and authorized by the statute. The voluntary recording, therefore, of an instrument, when not authorized by the statute, would be a mere nullity, and would not charge subsequent purchasers with any notice of its contents or of any rights arising under it."

Pomeroy Eq. Jurisprudence (Vol. 2, Sec. 650).

The provision making all unrecorded deeds void as to subsequent purchasers and creditors without notice "has no application to forged instruments, for they cannot affect a title one way or the other, and are therefore not entitled to record. It would be a dangerous doctrine, indeed, to hold that one, by forging a deed from his neighbor to himself and putting it upon record, could then by conveying to a third party having no notice of the forgery, confer upon the latter a good title, merely because the record showed the title in the forger. If such were the law, no man's title would be safe. The principle of justice and public policy alike forbid the adoption of such a rule. * * * The conclusion reached is fully sustained by the following authorities and others that might be cited: Pensonneau *vs.* Bleakley, 14 Ill., 15; Chandler *vs.* White, 84 *id.*, 435; Baird *vs.* Jackson, 98 *id.*, 78; Buckman *vs.* Dicker, 8 C. E. Green, 283; Arrison *vs.* Harmstead, 2 Barr., 191; Van Amringe *vs.* Morton, 4 Whart., 382."

Pry vs. *Pry* (109 Ill., pp. 466, 476).

"And neither the record of a forged deed, *nor the record of an absolutely void deed*, can be invoked to support or bolster up a disputed title, for the record is worth no more than the original deed itself. It is only instruments that have some validity, and that in some manner affect real estate, that can be recorded legally. There is no statute authorizing the recording of a void instrument, and it is an error to suppose that the statute can have the

effect of making valid an absolutely void instrument by permitting the void instrument to be recorded. The instrument is still void although recorded. The record can give it no validity. As tending to support the view that a purchaser of real estate from a person holding under a void recorded deed, although in fact a *bona fide* purchaser, cannot obtain a good or valid title, or indeed, any title, we would refer to the following authorities: *Everts* vs. *Agnes*, 6 Wisc., 453; *Tisher* vs. *Beckwith*, 30 Wisc., 55; *Chipman* vs. *Tucker*, 38 Wisc., 43, 20 Am. Rep. 1; *Van Amringe* vs. *Morton*, 4 Whart., 382; *Smith* vs. *South Royalton Bank*, 32 Vt., 341; *Harkreader* vs. *Clayton*, 56 Miss., 383; *Berry* vs. *Anderson*, 22 Ind., 37, 40. * * *

Stone vs. *French*, 37 Kans., 145.

"Nor does it [the rule that a perfect record title affords protection] obtain when the apparent title of record consists in part of a void deed, for such an instrument being a nullity can acquire no effect by registration, *and its record charges no one with notice.*"

Webb on Record of Title, Sec. 154.

Loomis vs. *Brush* (36 Mich., 40), holds that the record of a void deed is no notice.

Registration operates as notice only to those persons who are compelled to search the records in order to protect their own interests; that is, to those who have acquired their rights *after* the time when the record is made and not to prior parties. The registration does not act *as a notice* backwards in time.

2 Pomeroy's Eq. Jur., § 657, and note 2.
Webb on Record of Title, § 163.
Traphagen vs. *Irwin*, 18 Nebr., 195 (24 N. W. Rep., 685).

"Registry of a deed is not constructive notice to the

true owner, though it might be to subsequent purchasers through him."

Flint on Trusts & Trustees (§ 113).
Bates vs. *Norcross* (14 Pick., 224).
Crockett vs. *McGuire* (10 Mo., 34).
Styresant vs. *Hall* (2 Barb. Ch., 151).

I repeat, therefore, that, had these appellants and their sister Sophia Felix, from whom the title passed to them, if they had been white persons, they would not be barred of relief in the present suit.

Second.—I now proceed to consider the condition of these appellants and their sister, the original owner and patentee of the land in question, as TRIBAL INDIANS, and their exemption from the effect of lapse of time before bringing their suit. I need not remind this Court that this aspect of the case involves grave considerations, which go to the root of the public policy of the United States in its treatment of the aboriginal inhabitants of this continent whom the present dominant race have supplanted, and under whose rule they have been reduced, rightfully or wrongfully, to the verge of extinction.

The history of the great race who held dominion over the territory of the present United States when white men first set foot on the soil, is one of the most pathetic records presented in human annals. Mr. Bancroft, in his History, estimates their number at the first entrance of the whites at 10,000,000. Their decline in number and power has been a fruitful theme of orators, statesmen, preachers, poets and historians. From a time prior to the personal recollection of any one now in this presence, this race has occupied a large share of the attention of nearly all departments of the National Government.

This tribunal, before which these Indian appellants

and their enemy and despoiler now stand—has, for more than sixty years, dealt with and often defeated the wrongs attempted against the red man. The condition of the latter appeals now with greater pathos, and with a clearer warrant of justice, for protection against the acts, and especially against the frauds of one of the white race. It is true they retain but a remnant of their former number and greatness; but they are still sufficiently numerous and formidable to call for constant oversight, care and protection by the Federal Government. Their care and control absorb the time and attention of a large part of the military force of the nation, and their civil affairs require the constant and exclusive oversight of one of the most important administrative bureaus.

The utterances of the Courts, both State and National, have so uniformly recognized the disabilities of these people, and their exemption from the legal rules and responsibilities which govern and affect the dominant race, that they constitute one of the "Trade winds of the law." This Court is too familiar with these utterances to require more than the few citations which follow:

Cherokee Nation vs. *Georgia*, (5 Pet., 17).
Fellowes vs. *Black Smith* (19 How., 366).
Kansas Indians (5 Wall., 737).
New York Indians (5 Wall., 761).
Ex parte Crow Dog (109 U. S., 568).
Elk vs. *Wilkins* (112 U. S., 111).
U. S. vs. *Kagama* (118 U. S., 383).
Choctaw Nation vs. *U. S.* (119 U. S., 1).

This list of cases might be indefinitely extended. A few brief extracts from the opinions will not be amiss here.

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the

acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."

"They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."

Cherokee Nation vs. *State of Georgia* (5 Pet., 17).

Mr. Justice Nelson, speaking for this Court, said of the Indians, that they are "in a state of pupilage, and hold the relation to the government as a ward to his guardian."

Fellows vs. *Blacksmith* (19 How., 366, 371).

"If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a people distinct from others, capable of making treaties, separated from the jurisdiction of Kansas, and to be governed *exclusively* by the government of the Union.

"If under the control of Congress, *from necessity there can be no divided authority.*

"If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress.

"It may be, that they cannot exist much longer as a distinct people, in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens,' they enjoy the privilege of total immunity from State taxation. There can be no question of State sovereignty in the case." * *

"There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common. * * * While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. * * *Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization.*"

Kansas Indians (5 Wall., 755).

"They were, nevertheless, to be subject to the laws of the United States, *not in the sense of citizens, but as they had always been, as wards, subject to a guardian;* not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self governed society." On page 571, the Court said: "It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, according to rules and penalities, *of which they could have no previous*

warning; which judges them by a standard made by others and not for them, *which takes no account of the condition which should except them from its exactions, and makes no allowance for their inability to understand it.* * * * * * * To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this Court, from the beginning to the present time. To justify such a a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not able to find."

Ex parte Crow Dog (109 U. S., 568, 569).

"They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian."

Elk vs. *Wilkins* (112 U. S., 99).

In their dissenting opinion, Harlan and Woods, JJ., impliedly concede that Tribal Indians cannot sue and be sued in the State Courts.

"The plaintiff has become so far incorporated with the "mass of the people of Nebraska, that being, as the petition "avers, a citizen and resident thereof, he constitutes a "part of her militia, Comp. Stat. Neb., Ch. 56. *He may,* "*being no longer a member of an Indian tribe, sue and be* "*sued in her Courts.*"

"These Indian tribes *are* the wards of the nation. They "are communities *dependent* on the United States. De- "pendent largely for their daily food. Dependent "for their political rights. They owe no allegi- "ance to the States, and receive from them no protection. "Because of the local ill feeling, the people of the States "where they are found *are often their deadliest enemies.*

"From their very weakness and helplessness, so largely "due to the course of dealing of the Federal Government "with them, and the treaties in which it has been promised, "there arises the duty of protection, and with it the "power. This has always been recognized by the "Executive and by Congress, and by this Court whenever "the question has arisen."

United States vs. *Kagama* (118 U. S., 389).

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * * How the words of the treaty were understoood by this unlettered people, rather than their critical meaning, should form the rule of construction"; and then observe that: "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former. * * * * The parties are not on an equal footing, and that inequality is to be made good by the superior justice, which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, *equally subject to the same laws.*"

Choctaw Nation vs. *United States* (119 U. S., pp. 1, 27, 28).

The opinions of some of the State Courts are in the same line. I cite one:

Rollins vs. *Cherokees* (87 North Car., 246).

This was an attempt by white men to enforce a contract

entered into between the latter and Indians. In that case the Court said:

"It is obvious that the Indian tribes are in a state of pupilage to the general government, and the safeguards of law are placed over them to secure them and their property from the artful practices of designing men, the dictate of an enlightened sense of national duty to the weak and defenseless of a race rapidly diminishing in numbers and deemed incapable of self-protection." * * * * "It is quite obvious, then, that the general government, having assumed the guardianship and oversight of the various Indian tribes, and prescribed rules and regulations for their guardianship and protection, their contracts cannot be enforced against them in the State Courts without the consent of this parental authority, and redress must be sought for violated agreements in a different jurisdiction."

It should be borne in mind that neither Sophia Felix, nor these appellants, could, from the issuing of this scrip to her down to the year 1887, when this suit was brought, have instituted any suit in the courts of the United States for the purpose of having these fraudulent transactions of Patrick set aside, even had they known what he had done. They were neither aliens nor citizens of the United States and, therefore, did not come within the statutes conferring jurisdiction on the latter.

Karahoo vs. *Adams* (1 Dillon, 347).
McKay vs. *Campbell* (2 Sawyer, 118, 135).
Elk vs. *Milkin* (112 U. S. pp. 94, 109).

I do not overlook the statement in the opinion below in this case, that Indians sometimes apply to the State Courts for redress of their wrongs. It is quite true that, in some peculiar cases, they have done so, when they were compelled to as the only mode left to them by which they could secure protection. As a rule they failed to secure their rights from the State tribunals and had to appeal to this Court for redress. They could only reach

this Court through the State Courts, as the U. S. Circuit Courts were without jurisdiction. A notable case of this kind is that of the *Kansas Indians* (5 Wall., 737). But it by no means follows that the mere fact that there was a possibility that a suit might be brought in the State tribunals renders these people liable to the effect of all the laws of the State, and to the penalties which result from delay in case of ordinary suitors. In the case last referred to, this Court said (p. 758):

"It is argued, because the Indians seek the Courts of Kansas for the preservation of their rights, and the redress of wrongs, sometimes voluntarily, and in certain specified cases by direction of the Secretary of the Interior, they submit themselves to all the laws of the State. *But the conduct of the Indians is not to be measured by the same standard which we apply to the conduct of other people.* Kansas is not obliged to confer any rights on them. Because a sound policy may dictate the wisdom of treating them, in some respects, as she treats her own citizens, and thereby weaning them from the ancient attachment to their own customs, *they are none the less a separate people, under the protection of the general government.* This policy may eventually succeed in disbanding the tribe, *but until it does, the Indians cannot look to Kansas for protection*, nor can the general laws of the State taxing real estate within its limits reach their property."

To say to these poor people, "You must resort to the State Courts or lose your rights by lapse of time" would be to mock them. The relief which the State holds out to them is the mere "word of promise to the ear to be broken to the hope."

They have no part or lot in the management of the affairs of the State. They can neither vote, hold office nor sit on juries. As was said by this Court in *United States* vs. *Kagama*: "They owe no allegiance to the States

and receive from them no protection. Because of the local ill feeling the people where they are found are often their deadliest enemies."

The literal truth of this judicial utterance might be supplemented and confirmed by the well known popular maxim current in all the communities near which Indians reside, viz.: "While any good Indian is as good as a good white man, no Indian is good till he is dead."

Now let us group the particulars of the condition of Sophia Felix and these appellants during the period from 1863 down to within a few months of the time when this suit was brought.

1. They were Tribal Indians, in that state of inferiority, dependence, pupilage, restraint and wardship which has been repeatedly recognized by this Court, and in consequence of which it has held that they were exempt from the responsibilities and penalties to which white persons are subjected.

2. They were *per se* ignorant; at least, the bill shows that neither Sophia Felix nor her husband could write their own names. There is no presumption that the appellants were any better educated than their parents. The latter continued their Tribal relations and residence down to the 29th of August, 1887. (Record, p. 9, fol. 15.) One of the grounds upon which the Federal Government, in all its departments, including its Courts, has held that Indians were protected from responsibilities and liabilities to which whites are subject, has been their ignorance and that helplessness which results from it, and which is their prevailing condition.

3. They all were, at least during most of the time, residing in Minnesota, nearly four hundred miles from Omaha. They were poor and without the means of travelling.

4. As they were Tribal Indians, they could not even leave the reservation of their tribe without a special permit from the Indian agent under whose jurisdiction they were. The agents have always been required by the Commissioners of Indian Affairs to strictly enforce this rule. The circulars to agents being public documents, I quote from one (that of 1874):

"Agents are instructed to notify the Indians under their supervision that they must confine their movements wholly within the limits of their respective reservation, that under no pretext must they leave the same without a special permit in writing from the agent, and no such permit will be granted, except it shall be made to appear to the satisfaction of the agent that the issuance of the same will inure to the benefit of the applicant or applicants, and will in no event be likely to prove disadvantageous to the Indian service

"* * * Whenever it shall be deemed either necessary or judicious to grant to Indians a permit of the character above mentioned, an escort of police should accompany them."

5. They were absolutely ignorant of the transactions of Patrick.

6. To have obtained a permit to leave their reservation for an indefinite period of time in order to hunt through the land offices of the United States to discover what had been done with their scrip would have been impossible. Their ignorance and poverty, if nothing else, would have rendered such a permit impracticable and worthless.

Now, in the face of the condition of these Indians, and the declarations of this Court in regard to the subjection to,

and dependence on, the Government of the United States, and their exemption from the laws of the States, can the doctrine of laches, or that of adverse possession, or the statute of limitations, be held to bar their right to relief, because they did not do what was impossible, viz.: hunt out and discover this fraud, of which they were ignorant, and then bring a suit in the Courts of the State of Nebraska?

Such a rule applied to these people would be an application of the duty of a guardian to its dependent and helpless wards with a vengeance!

In every aspect of the case we confidently submit that these appellants are entitled to a judgment reversing the decision below, and remanding the case with such instructions as will secure their rights.

WM. D. SHIPMAN,
Of Counsel for Appellants.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 301.

PIERRE FELIX, ELIZABETH FELIX, LOUIS ROBINETT, HARRIET ROBINETT, DENNIS FELIX AND MARGARET FELIX, APPELLANTS,

v.

MATTHEWSON T. PATRICK, MARY PATRICK, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF J. C. COWIN AND J. H. PARSONS,
Of Counsel for Appellants.

REES PRINTING CO., OMAHA.

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Of Counsel for Appellants.

STATEMENT OF THE CASE.

On the 9th day of March, 1888, the above named appellants filed their bill of complaint in the Circuit Court of the United States for the District of Nebraska, against the above named appellees, and others, which bill of complaint, after stating jurisdictional grounds, alleged in substance as follows:

In the year 1854, one Sophia Felix was a half-breed or mixed blood of the Sioux or Dakota Nation of Indians, residing near Mendota, in the State of Minnesota.

Under and by virtue of a treaty of the Government of the United States known as the treaty of Prairie Du Chien, made with the half-breeds or mixed bloods of the Dakota or Sioux Nation of Indians, of date July 15th, 1830, and proclaimed February 1st, 1831, and an act of Congress approved July 17th, 1854, entitled "An Act authorizing the President of the United States to cause to be surveyed a tract of land in the Territory of Minnesota belonging to half-breeds or mixed bloods of the Dakota or Sioux Nation of Indians, and for other purposes," Sophia Felix was entitled to have issued to her, by the Government of the United States, scrip for the location of 480 acres of land. Thereafter, in the year 1857, the United States, through proper officers in that behalf provided, issued to Sophia Felix certificates of location or scrip to which she was entitled under said act, as follows:

Certificate No. 181, letters A and B, for 40 acres each; letter C for 80 acres; letters D and E, for 160 acres each.

Thereafter, and before the location as hereinafter described of said scrip, Sophia Felix intermarried with one David Garnelle (sometimes called Gammelle).

In the month of November, 1861, the appellee, Matthewson T. Patrick, procured from some person or persons unknown to the appellants, possession of certain of said scrip so issued to said Sophia Felix, that is to say No. 181, letter A, for 40 acres and letter C for 80 acres, and that he procured the same wrongfully and fraudulently, and with intent to appro-

priate the scrip to his own use, and defraud said Sophia Felix out of the same and out of all interest therein, and all benefits thereunder, and with the fraudulent intent to locate the scrip for his own use and benefit.

Thereafter, in pursuance of said fraudulent intent, on the 21st day of November, 1861, Matthewson T. Patrick, in the name of Sophia Felix, made application to the United States Land Office at Omaha, Nebraska, to locate the scrip so received by him, and located the same in the name of Sophia Felix upon the following described real estate, situate in the County of Douglas in the then Territory, now State of Nebraska, to-wit: The north half and the southeast quarter of the southeast quarter of section number nine (9), township fifteen (15) north of range thirteen (13) east, in the district of lands subject to sale at the Land Office at Omaha, Nebraska, containing one hundred and twenty (120) acres, in satisfaction of said Sioux half-breed scrip, so received by him as aforesaid.

On the 31st day of March, 1860, about eighteen months before the location of said scrip, some person or persons to the appellants unknown, by some wicked devices and fraudulent means, procured Sophia Felix, then Sophia Garnelle, together with her husband, David Garnelle, to execute a certain power of attorney in blank; also an instrument called a quit-claim deed, also issued in blank. These instruments are marked respectively Exhibits "A" and "B" and appear at pages 12 and 14 of the record. The instrument called the power of attorney purported to give authority, among other things, to grant, bargain, sell and convey, the real estate in controversy; but when procured from Sophia and David Garnelle

there was no one named in the instrument as the person to whom the power was granted, that part being left blank; nor was there any description of any property. Those parts of Exhibit "A" included in parenthesis were blanks when the instrument was procured as herein stated.

In the prosecution of the scheme to defraud Sophia Felix, Matthewson T. Patrick, on or about the 21st day of November 1861, secured the two instruments last described in the same condition as when procured from the Garnelles, and shortly afterward he caused the pretended power of attorney, in the place for designating the donee of the power, to be filled out with the words, "William Ruth, of the City of Omaha, County of Douglas, of the Territory of Nebraska," and also caused to be filled out and placed in said instrument a description of the property in controversy, and also a description of the scrip.

For the same fraudulent purpose, and at about the same time, he caused the blanks in the pretended quit claim deed, where the grantee should be described, to be filled out with the words, "Matthewson T. Patrick, of Omaha, in the County of Douglas, and Territory of Nebraska," there being no grantee named in said pretended quit claim deed when he received the same; also caused the blanks, where the property should be described, to be filled out with a description of the real estate in controversy, there being no description of any real estate in that instrument when he received the same; thus making the pretended power of attorney to appear and purport to be a grant of power to William Ruth to convey the property in controversy and the pretended quit-claim deed to be a conveyance, executed by said Sophia and David Garnelle, of the real estate in dispute to the appellee, Matthewson T. Patrick.

Thereafter, on the 7th day of September, 1863, Matthewson T. Patrick caused the pretended power of attorney and quit claim deed, here described, to be filed for record in the Recorder's office, of Douglas County, in the then Territory of Nebraska, and which instrument appeared in Book P, of Deeds, at pages 48 and 50 respectively.

In furtherance of said scheme to defraud, said Patrick on the 25th day of July, 1863, caused said William Ruth, whose name said Patrick had caused to be inserted in said power of attorney as hereinbefore stated, to make, execute and deliver to Patrick as grantee, a certain deed of conveyance of the property in controversy, by virtue of his pretended authority under the power of attorney mentioned. Said instrument is marked Exhibit "C," and appears at page 16 of the record. This instrument was also recorded on the same day in the Register of Deeds office for Douglas County.

On the 3d day of July, 1863, Mr. Patrick caused a patent to be issued by the United States for the land in controversy, in favor of Sophia Felix, and her heirs and assigns forever, under and by virtue of the location of the scrip so located by Mr. Patrick as hereinbefore stated.

Before the location of said scrip, Mr. Patrick was in possession of the premises upon which the scrip was located, and had attempted to acquire title to the same by pre-emption, but was unsuccessful, and he fraudulently procured and located the scrip for his own benefit to acquire title to the land.

In the further prosecution of the scheme to defraud Sophia Felix, Mr. Patrick procured to be enacted by the Congress of the United States, and to be approved by the President, February 2d., 1869, an act entitled "An Act to confirm the title to certain lands in the State of Nebraska," as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:*

"That the provisions and benefits of an act entitled 'An Act to confirm the titles to certain lands in the State of Nebraska,' approved the 25th day of July, A. D., 1868, be and the same are extended to the east half and the northwest quarter of the southeast quarter of section nine (9), township fifteen (15), range thirteen (13) east of the 6th Principal Meridian, in Douglas County, Nebraska, and that the title to the same is hereby confirmed to the parties holding by deed from the patentee."

The scrip in question was not transferable, and Sophia Felix had never parted with the title to or any interest in the scrip, was the absolute owner thereof, and sole beneficiary therein; and these facts Mr. Patrick knew at the time he procured and located the scrip and at all other times, and knew that the scrip and the blank instruments referred to had been fraudulently obtained from her.

Mr. Patrick never informed Sophia or David Garnelle, or any of the appellants, or any person related by blood to Sophia Garnelle, that he had procured said scrip, or that he had procured said blank instruments and filled the same out, or had caused a deed to be executed conveying to himself the real estate in question, or that he claimed any ownership therein; but on the contrary fraudulently concealed the same and exercised every precaution to prevent said proceedings coming to the knowledge of said parties.

Recognizing the frailty of a title based upon the wrongful acts heretofore set forth, Mr. Patrick endeavored for a long time to secure the execution of a deed by Sophia and David Garnelle, without letting them know the character of the instrument, whereby they would convey to him the fee in the real estate in question; and a letter is exhibited (Exhibit "E,'

page 18) showing the effort in this behalf of J. Patrick, the father of Matthewson T. Patrick, who directs to "have the feeler thrown out without giving the parties any particular information."

The bill of complaint further alleges that all the acts of Mr. Patrick in procuring the scrip, the blank papers, filling them out, procuring the execution of the deed by Ruth, recording the papers and securing the act of Congress to be passed, were all in the execution of an unlawful scheme devised and conceived by Matthewson T. Patrick to wrong and defraud Sophia Felix out of the scrip and the land upon which the same was located; that the said instruments so executed by Sophia and David Garnelle were not intended by them to be used for the purpose of conveying the property in controversy, or any part thereof, or any interest therein, or any other property, or any interest in the scrip, to any person or persons whomsoever, or to grant to any person or persons whomsoever any authority to make such conveyance to said Matthewson T. Patrick, or to any other person or persons; that no consideration whatever moved to or was received by Sophia or David Garnelle, or either of them, directly or indirectly, for the scrip or the execution of the papers.

Sophia Garnelle departed this life on or about the 25th day of December, 1865; that David Garnelle, her husband, departed this life in the year 1882, and that the mother of Sophia Felix died before the year 1865, and her father died on the 22nd day of October, 1867; neither of the parties named, during their lifetime had any knowledge whatever that Mr. Patrick had secured and located said scrip; had no

knowledge whatever that said pretended power of attorney and pretended quit claim deed had been filled out or used in any manner whatever, or had been recorded; had no knowledge whatever that said pretended power of attorney had been filled out, executed, used or placed on record; had no knowledge as to what disposition had been made of the scrip, and had no knowledge whatever of any of the acts of Matthewson T. Patrick herein set forth.

Sophia Felix died intestate, without issue surviving her; her father died intestate and the appellants, Pierre Felix, Dennis Felix and Harriet Robinett, are the brothers and sister of the full blood of Sophia Felix, and her sole heirs, as well as the sole heirs of their father; Elizabeth Felix is the wife of Dennis Felix, Margaret Felix is the wife of Pierre Felix and Louis Robinett is the husband of Harriet Felix, now Robinett. None of the appellants had any knowledge whatever of any of the facts set forth in the bill, of the issue, disposition or location of said scrip, or of any fact or allegation set forth in respect to the acts of the said Matthewson T. Patrick concerning said scrip and real estate until the year 1887.

All of the appellants from the time of their birth up to the 29th day of August, 1887, maintained tribal relations as members of the band known as the Santee Sioux of the Sioux Nation of Indians, and claim that by the several acts of Congress of the United States in that behalf provided, and the policy of the Government with respect to its administration of the Indian affairs of the Nation, and its goverment of the Indians, they were inhibited and barred from instituting and maintaining any action at law or in equity or instituting any proceedings whatever in any of the courts; that they were

denied access to each and all of the courts, Federal and State, and had no legal standing therein as a party, except the right to trial upon a criminal charge.

On the 29th day of April, 1868, the United States entered into a treaty with the several tribes of the Sioux Indians throughout the United States, in which treaty all the appellants were included, by virtue of which the United States agreed to allow the several Indians of said tribes certain areas of agricultural land, and provided that the members of the Sioux Nation, upon the allotment of land in severalty to them by the United States, and the issuance of patents for the same to, and the acceptance of the patents by, said Sioux Indians, that then and thereupon the Sioux so accepting the land should become citizens of the United States.

During the years 1886 and 1887 allotments of lands, under and by virtue of said treaty, were made by the United States to these several appellants, and patents for the same were issued and delivered to them on the 29th day of August, 1887; the same were accepted by them, and thereupon at that date they became citizens of the United States for the first time.

Mr. Patrick has claimed and asserted ownership in the disputed premises ever since the location of said scrip, under and by virtue of the same, and the instruments hereinbefore described, and still asserts such ownership and title. The bill is brought against Mr. Patrick and his grantees. Mr. Patrick, at the time of the commencement of the suit, was and still is, in possession and claims ownership of a large part of the property in dispute, which part is specifically described in the bill.

Upon these facts the appellants contended that the scrip in

question could not legally be sold or transferred; that in locating the scrip Mr. Patrick assumed to act and did in fact act as Sophia Felix's representative, agent or attorney; that he assumed to act for her, if his acts were to be sanctioned at all, in filling the blanks in the deeds and power of attorney, and transferring the property; that said deeds and power of attorney were void; that he assumed toward her a fiduciary relation with respect to the whole transaction; that he held the property in trust for her; and now in trust for the appellants. Also that he should account for rents, and that his grantees had knowledge of all the facts.

To this bill the several appellees interposed general demurrers, in substance for failure of the bill to state a cause of action, and laches on the part of the appellants. The learned Circuit Judge sustained the demurrers and thereupon judgment was entered accordingly, these appellants electing to stand upon their bill. From that ruling and judgment this appeal is taken.

SPECIFICATIONS OF ERROR.

The appellants contend that the Court below erred:

First. In finding and holding that Matthewson T. Patrick, one of the appellees, did not take and hold the property in controversy as trustee for Sophia Felix and these appellants; that said Patrick purchased and located the scrip in question in good faith for himself, that the deeds and power of attorney were valid, and that Sophia Felix and these appellants were chargeable with and guilty of laches in the

premises, and that such laches and the statute of limitations were a bar to the prosecution of this cause.

Second. The Court erred in sustaining the demurrers of the appellees to the appellants' bill, and in dismissing said bill and rendering judgments against these appellants for costs. And the decree is wholly erroneous.

I.

Patrick's Relation to Appellants is that of Trustee.

In locating the scrip, and in procuring the transfer from the United States Government of the title to the land in question herein, Patrick not only professed to act for Sophia Felix, but he necessarily acted in her name. The certificates of location, or scrip, issued to said Sophia Felix, were, by the express terms of the law authorizing them, limited to the exclusive use and benefit of said Sophia Felix. It was provided in said act "that no transfer or conveyance of any of said certificates or scrip shall be valid." The rights of Sophia Felix under said certificates of scrip were therefore incapable of transfer.

The only person who could own the certificates or scrip, and the only person who could locate land thereunder, was Sophia Felix. Hence the act of Patrick in locating this scrip upon the land in question, was an act avowedly of Sophia Felix, and professedly in her interest. Patrick, therefore, was acting in the premises for Sophia Felix. He located the certificates in a representative capacity, with Sophia Felix as his principal.

It is true he had no previous authority so to do, and she was at the time ignorant of the fact that he was so acting, yet her representatives have affirmed his acts by the bringing of this suit; they have adopted his location of the scrip, have ratified his acts done in her name in this regard, and now seek to hold him accountable for the property, he, with her scrip, secured in her name. Patrick having acted in her name in the location of this scrip cannot now disavow his fiduciary capacity. He voluntarily took upon himself a relation from which his trusteeship flows as a necessary consequence; he will not now be heard to repudiate his principal. In locating this scrip on behalf of Sophia Felix, in her name, he necessarily acted as her agent; in acting in her name to procure the Government to convey the legal title to the land to her, he took upon himself a fiduciary relation which he is estopped to deny.

Moreover by the allegations of the bill admitted by the demurrer, he had in his possession the blank power of attorney and the blank quit claim deed at the time he acted for her in the location of the scrip and obtaining the patent. These blank instruments he filled up, or caused to be filled up, so as to convey the land covered by the patent. He thus secured the conveyance to himself. He therefore assumed to act for Sophia Felix, not only in the location of the scrip, and obtaining the patent, but also in the disposition of the land covered by the patent and its transfer to the grantee. So far as the power of attorney, the quit claim deed, and the deed executed under the power, had any validity or force to convey the title, they had it by force of the fact that Sophia and her husband had signed and executed them in blank. The implied authority, if any existed, to fill the blanks and thus

designate the land to be conveyed and the grantee to whom it was to be conveyed, was an implied authority to act for her in that behalf. Therefore, Patrick assumed to act for her when he filled in a description of the land and inserted his own name as grantee, and he did so as the agent or attorney of her.

In other words, the fiduciary relation, which he assumed towards her, extended to, and covered the sale and transfer of the land as fully and completely as it did the location of the scrip and securing the patent.

Yet this Patrick who in these things acted for Sophia Felix and of necessity was her representative afterward managed to procure the title to this property himself. As Sophia Felix alone was entitled to locate the scrip and receive title to the land, and as he in her name located the scrip and procured the Government to convey the land, he of necessity was her agent. Thereupon without her knowledge he transfers the title to himself. Against such acts the courts of equity have established an absolute prohibition. As was said by Story, Justice, speaking for the Court:

"There is a stubborn rule of equity, founded upon the most solid reasoning, and supported by public policy, which forbade any such exchange. No rule is better settled than that a trustee cannot become a purchaser of the trust estate. He cannot be at once vendor and vendee. He cannot represent in himself two opposite and conflicting interests."

Wormley v. Wormley, 8 Wheaton, 421. (441)

And it matters not that the acts of Patrick in locating this scrip and in securing the transfer of the title to the land from the Government to Sophia Felix had not been authorized by her. Just as an intermeddler with the effects of a deceased person is accountable for the same as an executor *de son tort*,

so an intermeddler with the property of another is chargeable therewith as a trustee. The Supreme Court of West Virginia has announced the rule as follows:

A trustee *de son tort* is he who of his own authority enters into the possession or assumes the management of property which belongs beneficially to another; and he is subject to the same rules and remedies as other consecutive trustees."

Morris v. Joseph, 1 W. Va., 256.

Being thus under the averments of the bill herein a trustee as regards the land in question, under the well-settled rule of equity above referred to Patrick could not become the owner of the trust estate; in the contemplation of a court of equity he still holds the land as trustee for Sophia Felix, or her representatives, and equity will declare and enforce the trust.

Massie v. Watts, 6 Cranch, 148.

Railroad Company v. Durant, 95 U. S., 576.

Moreover Patrick is in law a trustee by reason of his fraudulent conduct in relation to the property in controversy.

We do not agree with the learned Judge who decided this case in the court below as to the nature of the acts of Patrick as disclosed by the bill of complaint herein. In the opinion of the trial court it is said: "Knowing as we do how land scrip passed in the market, the only fair understanding of the facts as disclosed by the bill is that this scrip was wrongfully obtained from Sophia Felix and placed on the market, and that defendant, seeking scrip wherewith to enter this land, found and purchased this." In fact the bill charges Patrick with acts widely different from those set forth in the statement of the learned Judge above quoted. The bill, after

averring that Patrick procured this scrip, and made application in the name of said Sophia Felix to the United States Land Office to locate the same, and in the name of said Sophia Felix did locate the same upon the land herein in controversy, contains the following averments:

"In this behalf your orators further say that at the time of said location the said Sophia Felix had never parted with the title to or any interest in said scrip, and was the absolute owner thereof and sole beneficiary therein; and these facts the said Matthewson T. Patrick at that time and at all times well knew, and the said location inured wholly to the benefit of said Sophia Felix, although the said Sophia Felix had no knowledge that the said Matthewson T. Patrick had procured the possession of said scrip or that he had located the same.

"Your orators, further complaining, say that the said Matthewson T. Patrick, in securing possession of said scrip, procured the same with the intent to appropriate the scrip to his own use and defraud the said Sophia Felix out of the same and out of all interest therein and out of all benefits thereunder, and located the same, designing it for his own use and benefit and with the fraudulent intent to deprive the said Sophia Felix out of all benefit and interest therein."

The bill further avers that Patrick procured the paper purporting to be the power of attorney and that purporting to be the deed and filled out the blanks therein and recorded the same, and procured the pretended trustee, William Ruth, to execute to him a conveyance of said property, all of said acts being "in the further prosecution of said scheme to defraud the said Sophia Felix as hereinbefore set forth." It is further averred that Patrick procured to be enacted by the Congress of the United States and approved by the President an act purporting to confirm his title to the land in question "in furtherance of said scheme to wrong the said Sophia Felix."

Further to show the fraudulent purpose of Patrick and his

evident desire to wrong appellants, reference in the bill is made to Exhibit "E," the letter which Patrick procured to be written to one George L. Otis, requesting that feelers be thrown out regarding the price at which a quit claim deed to the lands in question might be procured from Sophia Felix and husband, but cautioning his agent to avoid "giving the parties any particular information." To get a deed from ignorant Indians, by concealing from them the facts in relation to the property to be deeded, is his clearly expressed desire, and makes manifest the fraudulent nature of his entire dealing with this land.

It is further set forth in the bill "that all the acts of the said Matthewson T. Patrick in procuring said scrip, and said blank papers as aforesaid, in filling the same out as aforesaid, in procuring the execution of the said pretended warranty deed by the said Ruth as aforesaid, in recording said papers, and in securing said act of Congress to be passed, were all the execution of an unlawful scheme, devised and conceived by the said Matthewson T. Patrick to wrong and defraud said Sophia Felix out of said scrip and the said property as aforesaid."

The foregoing averments of the bill, admitted to be true by the demurrer, present a case in essential respects different from that stated by the learned trial Judge herein, wherein Patrick is assumed to have merely purchased this scrip in the market for his own use. We have here a man who well knew that Sophia Felix had never relinquished her interest in said scrip or her rights as sole beneficiary thereunder. He knew that it had been obtained from her by fraudulent means. He was well aware that the scrip was non-negotiable. With

full knowledge of her ownership of this scrip he conceives and executes a scheme to fraudulently deprive her of her rights as a beneficiary thereunder and to obtain this land for himself. It is by the demurrer herein conceded to be true that, in obtaining this scrip, in locating the same on the land in question, in procuring the blank power of attorney and quit claim deed, in filing the blanks therein so as to vest the legal title to the land in himself, in procuring the deed from William Ruth to himself, in securing the passage of the act of Congress above mentioned, Patrick was carrying to completion, step by step, a plan, the purpose of which was to defraud Sophia Felix. It was conscious and deliberate wrong-doing. It was a flagrant imposition upon one whose lack of business capacity is shown in her position as a ward of the Nation, an Indian maintaining tribal relations. The result of these fraudulent practices was to vest in Patrick the land located and acquired under the scrip of Sophia Felix. With full knowledge of all her equities, Patrick located her scrip, procured the title to this land to be conveyed by the United States to her, and by fraudulent practices, with intent to wrong, Patrick secured in his own name the land which the government had granted to Sophia Felix. This confessed fraud of Patrick, by which the land granted to Sophia Felix, was, without recompense or pretense of consideration to her, obtained by Patrick, raises, in equity, a trust relation between Patrick and Sophia Felix and charges him with all the duties and responsibilities of a trustee in regard to the land thus wrongfully obtained. In such case equity impresses the property with a trust *ex maleficio*. The governing rule is well stated by a learned writer as follows:

"In general, whenever the legal title to property, real or

personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired, in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein."

Pomeroy's Equity Jurisprudence, Sec. 1053.

Railroad Company v. Durant, 95 U. S. 576, is a case wherein Durant had wrongfully held the title to lands equitably belonging to the Railroad Company. His conduct was fraudulent. In speaking of it this Court said that it "strongly offends the moral sense of the judicial mind." A bill was filed to declare and enforce the trust. The case was tried in the Circuit Court of the United States for the District of Nebraska, and the trial court dismissed the bill; this Court characterizing the actions of Durant in the language quoted, reversed the decree of the trial court and declared Durant a trustee for the Company. In the case at bar we have confessed fraud of Patrick in obtaining the land in controversy; his conduct, more than that of Durant, "offends the moral sense of the judicial mind;" it demands a similar action of this court, and a reversal of the decree entered herein by the trial Judge.

Perry declares the principle as follows:

"There is another large class of trusts which arise from frauds committed by one party upon another. Thus if one party procures the legal title to property from another by fraud, or misrepresentation or concealment * * *, equity will convert such party thus obtaining property into a trustee."

Perry on Trusts (3rd Ed.), Sec. 166.

Under the rules of law set forth in the foregoing authorities, we maintain that the fraudulent acts of Patrick, as disclosed by the bill, present a case wherein a court of equity should raise a trust in favor of appellants.

The Fact that Sophia Felix did not Know of the Acts of Patrick will not Prevent the Creation of a Trust in her Favor.

It is averred in the bill that Sophia Felix, at the time of the commission by Patrick of those acts which created the trust in her favor as to the land in question, was ignorant of such acts.

None the less, however, is a trust established. Where one so acts as to charge himself as trustee, the fact that the beneficiary was not aware of his actions, in no wise prevents courts of equity from declaring such trust. This has been clearly stated by this Court as follows:

"We entirely concur with the doctrine laid down in 1 Johns. Ch., 205; 3 ibid., 261, that where a trust is created for the benefit of a third party, though without his knowledge, at the time, he may affirm the trust, and enforce its execution."

The Bank of Metropolis v. Guttschlick, 14 Pet., 19.

The Fact that Patrick Obtained the Scrip While Standing in no Fiduciary Relation to Sophia Felix will not Prevent a Court from raising a Trust in her Favor.

It was claimed by counsel for appellee upon the argument of this case before the trial court that the acts of Patrick in

obtaining the scrip, as set forth in the bill, amounted to a crime; that the scrip was not delivered to him in any fiduciary capacity. And it was urged that, as Patrick obtained the scrip by a felony and converted it into land, no trust could be declared in the land. The counsel relied upon the doctrine announced by some judges, as set forth in *Perry on Trusts*, Vol. 1 (3d Ed.), page 144, as follows:

"If one who stands in no fiduciary relation to another appropriates the other's money and invests it in real estate, or other property, no trust results to the owner of the money."

It is true that some authorities would seem to give support to that doctrine, yet the weight of reason and the principles underlying equity jurisprudence are opposed to it.

This doctrine is based upon the theory that by his crime a thief acquires title to the property stolen, and that when he invests it he invests it as his own money and not as that of the person from whom he stole it. We submit that this theory is as unsound as it is abhorrent. Larceny surely should not be recognized in equity as a source of title. The thief ought not to be recognized as the *bona fide* holder of money and as holding it free from the rights of the real owner. What possible distinction is there between larceny and embezzlement as to the rights of the respective criminals to the property wrongfully appropriated? The thief who steals the money o a person, just as the clerk who embezzles money, holds the same as the property of the person from whom it is taken, and both should be alike responsible therefor. And if both invest the money so wrongfully taken in land, there is no well-grounded reason why the embezzler should hold the land as trustee and the thief should not.

An instructive case, in which this question was fully con-

sidered, has been decided by the courts of the State of New York. Certain Government and other bonds amounting to $14,000.00 had been stolen; the thief sold the bonds and invested the money arising from such sale, and the question presented was whether a trust in favor of the person from whom the bonds were stolen was created in the properties purchased by the thief with the proceeds of the sale of the stolen bonds. The trial Court, adopting the principle above mentioned, held that:

"These bonds, having been stolen and sold by the felons and the money arising therefrom invested, no trust is created, or can be implied as to the securities taken therefor * * * for the benefit or in favor of the plaintiff."

The case then came by appeal before the Supreme Court of the State of New York. That Court reverse the judgment of the lower Court, repudiate the doctrine upon which it was based, and in a well-considered opinion, Porter J., says:

"With great deference and respect for the learned Judge who found the facts in this case, I am compelled to differ with him totally in his legal conclusions. It would be, in my opinion, a most lamentable proposition to adopt into either the legal or equitable jurisprudence of this country, that by established principles of law the thief can be protected from legal liability to the owner of property from whom he has stolen it, while one who has obtained it by only a misdemeanor or a fraud can be held liable. This, as I understand the conclusions of law found in the case, is the ground upon which the case was decided; and this, upon the exploded idea that 'the bonds having been stolen and sold by the felons and the moneys arising therefrom invested, no trust is created or can be implied as to the securities taken therefor in the hands of those who hold such security with knowledge of the larceny and its avails.'"

And the Judge, with righteous repugnance at a doctrine which would convert a felony into a warranty of title, further says:

"I shall not yield my judicial opinion to such a view until overruled by a higher tribunal, and shall even in that contingency still protest that such a holding would be a reproach upon the administration of the law. I do not, by this, mean to say that the learned Judge intended to lay down as a legal proposition what may be implied from my remarks. He was doubtless looking to the *form*, rather than to the *principle;* but, in that view, I think he was also mistaken. Even regarding the possession of the property as a trust, I hold the law to be that, wherever the circumstances of a transaction are such that the person who takes an estate in property, cannot enjoy the beneficial interest without necessarily violating some established principle of justice and equity and good morals, the Court will immediately raise a constructive trust and fasten it on the conscience of the possessor and convert him into a trustee for the true owner. In all such cases courts of equity have adopted principles extremely broad and comprehensive in the application of remedial justice. They will interfere, not only to administer wholesome justice, but even stern justice in favor of innocent persons who are sufferers by it without any fault on their side. And this is readily done by converting the offending party into a trustee. * * * "

BALCOM, J., in a separate opinion in the case, said:

"I think Porter, Minor and Warren should be regarded and held to be trustees and be adjudged to hold the notes and mortgage in question, and the avails thereof, as trustees by construction for the benefit of the plaintiff; the Court should not refuse to allow a party to recover the avails of property stolen from him on any technical grounds, when the merits of the case clearly require that he should recover; and the Court should jump all technicalities and be as astute in discovering a remedy for upholding the rights of such a party, as the thief is in contriving ways and means to cheat him out of his property, and the avails of it, by changing the same from one kind to another and placing it in the hands of third persons. The plaintiff should be regarded as the owner of the avails of the bonds that were stolen from her. * * * The mere changing of such avails from one kind of property or security into another, or from money into securities, did not affect the plaintiff's right thereto."

MILLER, Justice, in delivering a separate opinion in the case, said:

"It would certainly be an anomaly in the history of legal proceedings and a grave reflection upon the administration of justice, if a felon could invest the fruits of his crime or dispose of them in such a manner as to place them beyond the reach of the law. The person whose property had been feloniously appropriated in such an emergency would be left without any redress whatever, while the felon would reap the pecuniary benefit arising from his crime. If convicted of the offense and punished by imprisonment, he might atone for the crime committed against the public, but in this manner could not restore to the sufferer the property which he had stolen. The law does not sanction any such absurdity."

Newton v. Porter, 5 Lansing, 416.

Judgment having been rendered in said case in favor of the plaintiff in accordance with the opinion of the Supreme Court which judgment was affirmed at the general term of the Supreme Court, an appeal therefrom was taken by the defendants to the Court of Appeals of the State of New York, where the question was again considered and the same conclusion reached. ANDREW, J., in delivering the unanimous opinion of the Court, said:

"It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust and converts it into trust property and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity in respect to his remedy to recover it, or the property into

which it had been converted, than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust *in invitum* out of the transaction * *."

And the Court further say:

"The thieves certainly have no claim to the securities in which the proceeds of the bonds were invested as against the plaintiff; they, without her consent, have disposed of her property and put it beyond her reach. If the avails remained in their hands in money, the direct proceeds of the sale, can it be doubted that she could reach it? * * * That she could assert an equitable claim to the money, I have no doubt; and this equitable right to follow the proceeds would continue and attach to any securities or property in which the proceeds were invested, so long as they could be traced and identified, and the rights of *bona fide* purchasers had not intervened."

Newton v. Porter, 69 N. Y. 133.

We believe the views of the Judges announced in this case, as above quoted, are sound and salutary; that they are consonant with the doctrines of courts of equity; and that they should prevail. To hold otherswise is to maintain a doctrine which shocks the conscience.

But even were it otherwise, Patrick could not deny the trust by virtue of this rule. Were we to assent to the doctrine that when a thief invests stolen money in land the owner of the money cannot follow it into the land and charge the thief as trustee, the doctrine could have no application to this case. Patrick did not convert this scrip into land. These certificates of location were not invested in land as is money. The scrip was merely evidence of a right to the land. The scrip was simply the authority granted Sophia Felix to take this land. The land was the substantive thing; the land was

the property to which she was entitled and out of which she was defrauded. If one who stands in no fiduciary relation to another appropriates the other's warehouse receipts, presents them at the warehouse and secures the property, can it for a moment be doubted that he would be chargeable as a trustee in respect to the property thus secured? The fact that he had stolen the warehouse receipts would not tie the hands of a court of equity. The distinction between such a case and one wherein a person steals money and then invests the money in lands is evident. The case at bar is in all essentials similar to the case supposed. Here Patrick wrongfully appropriates scrip which is merely authority to obtain title to land; he obtains this title. By the plainest principles of equity he is bound to respond as a trustee for the real owner of the property. The scrip bears the same relation to the land that the warehouse receipt does to the property stored. In this case it is the land that is the trust estate. Patrick, in wrongfully obtaining title to the land, wrongfully obtained the trust estate. It matters not in such case that no fiduciary relation existed between him and the rightful owner; the trust will be declared, nevertheless. The rule has been clearly stated as follows:

"It is not essential for the application of this doctrine (of constructive trusts) that an actual trust or fiduciary relation should exist between the original wrong-doer and the beneficial owner. Wherever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds."

Pomeroy's Equity Jurisprudence, Sec. 1051.

Another ground on which equity will declare and enforce a trust is ignorance on the part of the persons whose property

has been taken. The bill in this case alleges that Sophia Felix, as well as her husband, was entirely ignorant that the government had conveyed this land to her, and knew nothing of its value. Neither she nor her husband had any knowledge that Ruth's name had been inserted in the blank power of attorney, that Patrick was to act in her behalf or become her grantee. All the transaction resulting in the transfer of her title to this land to Patrick were facts of which she was entirely ignorant, and the bill charges that Patrick at the time of the transaction well knew Sophia Felix and her husband were thus ignorant of these facts. The bill avers that no consideration whatsoever was paid for this land by Patrick and none received by Sophia Felix therefor. These facts furnish ground for interference by a court of equity in the fastening of a trust regarding the land upon Patrick.

"If a party in ignorance and mistake of his rights and interests, execute a conveyance, although no fraud is practiced upon him, a court of equity will relieve against the instrument, for it is against good conscience to take advantage of one's ignorance to obtain his property. Thus if an heir, in ignorance of the value of his inheritance, or in ignorance that some legacies or devises had lapsed, should convey his interest for an inadequate consideration, equity would convert the purchaser into a trustee. And if the purchaser should have full knowledge, or should stand in any confidential relation, or should practice the slightest art to mislead or conceal, the equities would, of course, be much stronger against the transaction."

Perry on Trusts (3rd Ed.), Sec. 184.

Upon the foregoing considerations we claim that, under the confessed averments of the bill, a court of equity will declare Patrick a trustee in respect to this property and fasten upon him full liability as such.

Patrick Cannot Question the Ownership of Appellants in the Land in Question.

Patrick, having obtained this land by the location of the scrip, in the name of Sophia Felix, holds the same for her as her trustee. His fraudulent practices which resulted in transferring to him the legal title, are of no avail. Having procured the government to convey the land to her, having secured the land in her name, and holding the same for her as trustee, he cannot now be heard to say that the land was not subject to be located under this scrip, that the location was invalid, or that Sophia Felix had no real title to the land. That the trust is created *in invitum* can make no difference. Holding the legal title to this land for her, just as fully as though he held under her as tenant, Patrick is estopped to claim that her title is defective. As was said by this Court:

"The same relation as that of landlord and tenant subsists between a trustee and the *cestui que trust*, as it regards the title."

Walden v. Bodley, 14 Peters, 156.

A trustee cannot deny the title of the *cestui que trust*.

Perry on Trusts (3rd Ed.), Sec. 433.

When Patrick Obtained the Passage of the Act of Congress Confirming the Legal Title to this Land, the Benefit of such Act Inured to Sophia Felix.

After Patrick had located this scrip and procured the Government of the United States to transfer the legal title to this

land to Sophia Felix, and after he fraudulently procured the transfer of the legal title to himself, he held the same, as he holds it now, as trustee for Sophia Felix. While holding the legal title as such trustee he, professing some doubts as to the title, procured the passage by Congress of an act confirming the legal title under the patent to Sophia Felix. It is now claimed by his counsel that the title acquired in the name of Sophia Felix and transferred to Patrick was invalid, and that by virtue of this act of Congress the legal title to the property became vested in Patrick personally and that he is the true and real owner of the land by virtue thereof. But little consideration is needed to make manifest the unsoundness of this claim.

Patrick, as was said, held and holds this land as trustee for Sophia Felix. While holding in that capacity, that is, while he was so situated that equity fastens upon him the responsibilities and liabilities of that relation, he procured the passage of an act by Congress providing that the title to the lands in question " is hereby confirmed to the parties holding by deed from the patentee." The party acting as trustee, and who must bear all the burdens of that office, procures an act curing a supposed defect in the proceedings under which the legal title was secured. As trustee he is bound to act for the interest of the *cestui que trust*; he cannot acquire any interest in the trust estate; he cannot personally acquire and hold title thereto or ownership therein; if he does purchase the same, or if he does secure a conveyance necessary to perfect the legal title thereto, the benefit of the act goes to his *cestui que trust*. His act must result to the benefit of the beneficiary owner, and he will hold the title so acquired in the capacity of trustee.

This governing rule is well illustrated in a case decided by this Court. A certain Ferdinand O'Neal employed one Massie to locate in his name and survey for him a military warrant for four thousand acres. Massie located the warrant with the proper surveyor, but so surveyed the land that the land actually surveyed was not the land located with the surveyor. By this means O'Neal lost a part of his land. The surveyor, Massie, knowing of this defect, himself properly located and surveyed this part of O'Neal's land and procured in his own name the legal title thereto. This Court without dissent hold that Massie held such land as trustee for O'Neal. In his opinion the Court, MARSHALL, Ch. J., say:

"But Massie, the agent of O'Neal, has entered and surveyed a portion of that land for himself and obtained a patent for it in his own name. According to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for himself, otherwise than as trustee for his principal."

Massie v. Watts, 6 Cranch, 148.

Irvine v. Marshall et al., 20 Howard, 558.

Under this well-settled rule of law all title derived by Patrick through this act of Congress is held by him as trustee for appellants.

A Constructive Trustee is Liable in all Respects as though he were an Express Trustee.

The force of the foregoing considerations is sought to be broken by counsel for appellee by claiming that if Patrick is a trustee at all, he is a constructive trustee, and that his liabili-

ties as such differ from those of an express trustee. In this we think counsel are in error. It is true that in a strict sense a constructive trust is no trust, inasmuch as the same does not find its origin in any intention of the parties ; but in its effect and in the legal consequences which flow from the same, and in the liabilities imposed upon the trustee therein, there is no essential distinction. When, by reason of fraud, equity raises a constructive trust in all respects as regards the remedy given to the benficial owner of the property the trustee is regarded as an express trustee. His wrongful acts furnish ground for the creation of the trust and his liability is as full and broad and his responsibility as great as though he had assumed the trust relation voluntarily and with the intent to faithfully perform the same. No other doctrine would enable courts of equity to grant full,adequate relief. An able writer has from the authorities deduced the following principle:

"When it is said that the person who fraudulently receives or possesses himself of trust property or who has defrauded another of his estate by misrepresentation, concealment or other fraudulent practices, is converted by the court into a trustee and ordered to account for or reconvey the property, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties defrauded or beneficially entitled have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of the trust. Generally speaking the constructive trusts described in this chapter are not trusts at all, in the strict and proper signification of the word 'trusts;' but as courts are agreed in administering the same remedy in a certain class of frauds as are administered in fraudulent breaches of trusts and as courts and the profession have concurred in calling such frauds constructive trusts, there can be no misapprehension in continuing the same phraseology while a change might lead to confusion and misunderstanding."

Perry on Trusts (*3rd Ed.*), 166.

II.

The Objection that this Scrip was Wrongfully Located, and that Sophia Felix took Nothing by the Location and Patent, is not Available to Appellee.

It was provided in the act of Congress authorizing the issuing of this scrip, that it was to be located upon certain lands within the Indian reservation, "or upon any other unoccupied lands subject to pre-emption or private sale." Under the provisions of the act of Congress of September 4th, A. D. 1841, being Section 2258 of the revised statutes of the United States, "lands included within the limits of any incorporated town, or selected as a site of a city or town," were not subject to the rights of pre-emption or private sale. It was contended by appellee before the trial court that by an act of the Territorial Legislature of the then Territory of Nebraska, approved February 2nd, 1857, being an act to incorporate the City of Omaha, the lands in question were made a part of said city; and it was argued that inasmuch as these lands were included within the limits of the City of Omaha, and hence not subject to pre-emption, and therefore not lands upon which this scrip could be located, Sophia Felix took nothing by the location of the scrip upon this land and never had any rights in said land as patentee or *cestui que trust*; and that as a consequence appellants could have no rights to be enforced in this suit. We maintain that this contention cannot prevail for the following reasons:

(1). It is not set forth in the bill that the lands in question were at the time of the location of the scrip within the limits of the City of Omaha.

(2). If the Court could take judicial knowledge thereof, it would not be permitted to Patrick to raise the objection that these lands were not among those upon which this scrip was allowed to be located; that objection could only be made by the government of the United States in this case, as it is not claimed that any third party has any interest in these lands not derived from the patentee. The lands belonged to the United States; upon the location of this scrip upon these lands the government granted the patent to Sophia Felix; if wrong was done it was to the government; if any one could complain of this patent it was the government. The United States government, alone, could raise the objection that this scrip could not be located upon these lands. And inasmuch as the Government has not recalled or attacked the patent, but on the contrary as it has confirmed it and the titles of those holding under it, Patrick will not now be heard to urge the point to cover his fraudulent transactions. Whether the land conveyed by the patent to Sophia Felix was included within the limits of any incorporated town, or selected as the site of a city or town, was a question of fact which the officers of the Land Department must necessarily have passed upon before the patent issued upon the location of this scrip; and their decision as evidenced by the patent is conclusive unless attacked in equity in a direct proceeding for that purpose. This Court has already passed upon the question, saying:

"The patent of the United States is the conveyance by which the Nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous pro-

visions designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a Land Department, as part of the administrative and executive branch of the Government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty, the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this Court that their judgment, as to matters of fact properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment is * * * unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent * * * not merely operates to pass the title, but is in the nature of an official declaration * * * that all the requirements preliminary to its issue have been complied with."

The Court holds, therefore, that the patent, except when directly attacked, is conclusive evidence of the title of the patentee.

Smelting Company v. Kemp, 104 U. S., 636.

To the same effect is

Gibson v. Choteau, 13 Wallace, 92.

Under this rule Patrick cannot now in this proceeding question the title of Sophia Felix under the patent from the Government.

(3.) The act of the Territorial Legislature incorporating the city of Omaha could not have the effect of withdrawing this land from pre-emption or private sale, as it contravened the act of Congress.

The Town-site act of 1844, which provides for the entry of the public land settled upon and occupied as a town, contains the following proviso:

"*Provided*, That the entry of the land intended by this act be made prior to the commencement of the public sale of the body of the land in which it is included, and that the entry shall include only such land as is actually occupied by the town, to be made in conformity to the legal sub-divisions of the public lands authorized by the act of 24th April, 1820, and shall not in the whole exceed three hundred and twenty acres."

The act of Nebraska's Territorial legislature, incorporating the City of Omaha, enclosed within the limits of that city more than six hundred acres.

The right was given to locate this scrip upon all land subject to pre-emption or private sale. The public land was subject to pre-emption except when enclosed within the limits of an incorporated town or selected as the site for a city or town. Congress, to prevent all its lands from being taken out of the right of pre-emption, limited the size of towns to three hundred and twenty acres. Yet the act incorporating this city included over six hundred acres. If the legislature could ignore the limitation as to the size of a town site set by Congress, it could incorporate a city including within its limits five thousand acres and thus withdraw a princely domain from pre-emption. Manifestly the attempt of the legislature to do this is illegal and void. The power of Congress over the terms, conditions and mode of disposing of the public lands cannot be restrained or interfered with by State legislation.

Gibson v. Chouteau, 13 Wallace, 92.

(4) This scrip, as we have seen, could be located "upon any unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by the

Government, upon which they have respectively made improvements." It is claimed by appellee that the land in question was not subject to pre-emption. Even were that true, *the land was nevertheless subject to private sale.* And the fact that the Government parted with its title, and accepted the location of this scrip, is conclusive evidence in this case as to all persons, except the United States, of the fact that the lands located were subject to private sale, or that the lands were such not reserved by the Government as could be located with this scrip.

We maintain, therefore, that the title vested in Sophia Felix by the patent to the lands in question must in this litigation be considered as perfect.

III.

APPELLANTS ARE ENTITLED TO TAKE THE REAL ESTATE IN QUESTION BY INHERITANCE.

In the argument of this cause below it was contended by appellees that the appellants being tribal Indians could not claim these lands as heirs; that an Indian maintaining tribal relations, as a member of a tribe of American Indians, could not take real estate in the State of Nebraska, by descent, and that the word "person" in the Statutes of Nebraska with respect to descent was not intended to apply to tribal Indians.

It is apparent that counsel for the appellees make most convenient use of this word "person." In this case it is urged that, with respect to the provisions of the law giving to all persons access to the courts, the word "person" *does* include tribal Indians; but, with respect to that provision of the law regarding persons taking by descent, the word "person" *does not* include tribal Indians.

In the case of the *United States v. 43 Gallons of Whisky*, 93 U. S., 188, Mr. Justice DAVIS, said:

"The power to make treaties with the Indian tribes is, as we have seen, co-extensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disabilities of citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the Territory of the other. If a treaty to which the United States is a party removed such disability and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the Statutes of a State; but in that event the courts would disregard them, and give the alien the full protection conferred by its provisions."

The treaties and acts of Congress referred to under which the scrip in question was issued, gave to the Indians and to their heirs the fee in the land to be acquired by the scrip; and the patent issued to Sophia Felix by the Government to the land in question contains these words: "Now, Know Ye, that the United States of America, in consideration of the premises have given and granted, and by these presents do give and grant unto the said Sophia Felix and to her heirs the said tract above described; to have and to hold the same, together with the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, unto the said Sophia Felix, and to her heirs and assigns forever." The land, before

the grant, was the property of the United States. In this case the patent and the grant cannot be questioned except by the United States. It had authority and it *did* grant the land to Sophia Felix and her heirs and assigns forever, and Sophia Felix and her heirs took accordingly, any statute of any State to the contrary notwithstanding.

Besides the act of Congress of July 17th, 1854 (10 *U. S. Stat.* 304), provided that the President be authorized to "exchange" with the half-breeds of Dakota for a tract of land lying on the west side of Lake Pepin and the Mississippi River, in the territory of Minnesota; and for the purpose of effecting the "exchange" there was to issue to the half-breeds a certificate of scrip for the *same amount* of land, to which each individual would be entitled on a *pro rata* division among them. They, in their turn, were to execute a full and complete relinquishment of all their rights and interests to the United States of the tract in question. And these certificates or scrip were authorized to be located upon any lands within the reservation, etc. "Or upon any unoccupied lands subject to pre-emption, *or private sale*, or upon any other unsurveyed lands not reserved by government upon which they have respectively made improvements." It is distinctly stated in the act that the issuance of scrip was to operate as an "exchange," the "exchange" to be completed upon the "location" of the scrip; such scrip was to be located acre for acre.

2 Blackstone 323 says:

"An exchange is a mutual grant of equal interest, the one in consideration of the other. The word 'exchange' is so individually requisite and appropriated by law to this case that it cannot be supplied by any other word or expressed by any circumlocution. The estates exchanged must be equal in

quantity, not of value, for that is immaterial, but of interest; *as fee simple for fee simple, etc.* No livery of seisin, even in exchange of freeholds, is necessary to perfect the conveyance, for each party stands in place of the other and occupies his right," etc.

Upon the "exchange" being effected the title in fee simple vested in Sophia Felix.

IV.

THIS ACTION SHOULD NOT BE DEFEATED ON THE GROUND OF LACHES, NOR BARRED BY THE STATUTE OF LIMITATIONS.

If this was an express trust, there can be no bar from laches. If a constructive trust, whether the bar of laches will apply must depend on all the circumstances, including the character and particular disability and helplessness of the Indians.

But if the trust is technically constructive, and not express, it by no means follows that relief is barred by lapse of time, even if the appellants are subject to the same duties and responsibilities which white persons are.

In the case of *Michoud v. Girod*, 3 How. 503, the Court said: "Still, within what time a constructive trust will be barred must depend upon the circumstances of the case." And again;

"There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of

equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the parties whose rights are affected by it."

And to the same effect:

Perry on Trusts, Sections 229, 230, 861, 867, 868.
Oliver et al, v. Piatt, 3 How., 332.
Prevost v. Gratz, 6 Wheat., 481.

The conduct of Patrick was grossly fraudulent. He got ssposesion of the scrip to which he knew he had no title; he located it and obtained the patent, acting for and in the name of the scripee, and then used the power of attorney and the quit claim deed to vest the title in himself. We say "used the power of attorney," for he had Ruth's name inserted therein and then took a deed from him.

He knew the scrip belonged to Sophia Felix; he knew it was wrongfully obtained from her, and he paid no consideration whatever therefor.

He concealed his whole doings in the transaction from the person for whom he assumed to act. Now, in view of the fact that he knew the scrip was hers; that he knew it was wrongfully obtained from her; that he assumed toward her a fiduciary relation in locating the scrip in her name, it was his duty to inform her fully of all the facts, and his failure to do so was essentially and effectually concealment from her.

The Statutes of Limitations of Nebraska bearing upon the questions of real estate are as follows:

"An action for the recovery of the title or possession of lands, tenements and hereditaments can only be brought within ten years after such cause of action shall have accrued.

This section shall be construed to apply also to mortgages." (Statutes of Nebraska, 1891, Sec. 4542).

This section of the statute, from the time of the organization of the state up to the year 1869, made the time twenty-one years instead of ten years.

"Any person entitled to commence any action for the recovery of the title or possession of any lands, tenements or hereditaments, who may be under any legal disability when the cause of action accrues, may bring such action within ten years after the disability is removed, and at no other time." (Statutes of Nebraska, 1891, Sec. 4543).

"If a person entitled to bring any action mentioned in this title, except for a penalty or forfeiture, be at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this title after such disability shall be removed." (Statutes of Nebraska, 1891, 4553).

"Within four years * * * an action for relief on the ground of fraud but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." (Statutes of Nebraska, 1891, 4548).

V.

THE STATUS OF TRIBAL INDIANS WITH RESPECT TO THE QUESTION OF LACHES OF THE APPELLANTS AND SOPHIA FELIX.

First. The authority of the Fedral Government over tribal Indians is exclusive.

The authority of the Government of the United States, as the guardian of the Indian tribes, is based upon rights acquired

by conquest or by treaties, and there is no division of the powers and duties of this guardianship between the general Government and the State Governments.

In the case of *United States v.* 43 *Gallons of Whisky*, 93 U. S. 195, Mr. Justice DAVIS, speaking for the Court, said:

"If Congress has the power, as the case we have last cited decides, to punish the sale of liquor anywhere to an individual member of an Indian tribe, why cannot it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction; and, as there can be no divided authority on the subject, our duty to them, our regard for their material and moral welfare, would require us to impose further legislative restrictions, should country adjacent to their reservation be used to carry on the liquor traffic with them."

And again at page 197:

"The fact that the ceded territory is within the limits of Minnesota, is a mere incident, for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without state limits. Based as it is exclusively on the Federal authority over the *subject matter*, there is no disturbance of the principle of state equality."

In the case of *United States v. Kagama*, 118 U. S., at page 383, Mr. Justice MILLER, speaking for the Court, said:

"These Indian tribes are wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of the dealing of the Federal Government with them and to the treaty in which it has been promised, there arises the duty of protection, and with it the power."

To the same effect a large number of cases decided in this court could be cited, but we deem it wholly unnecessary.

Second. "From their weakness and helplessness so largely due to the course of the Federal Government with them," and the restrictions thrown around tribal Indians, the ordinary rules with respect to Laches attaching to the affairs of persons unquestionably sui juris, cannot be applied to these Appellants or Sophia Felix.

"Half-breed Indians are to be treated as Indians in all respects so long as they retain their tribal relations."

7th Op. Attys. Gen'l., 746.

It is alleged in the bill, and of course admitted by the demurrers, that Sophia Felix, up to the time of her death, and these appellants, up to August 29th, 1887, were tribal Indians living upon a reservation, and under all the restraints and disabilities attached to such a condition.

In the case of the *Choctaw Nation v. U. S.* 119 U. S., at page 28, Mr. Justice MATTHEWS, speaking for the Court, said:

"The recognized relation between the parties to this controversy, therefore, is that between superior and inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is extended by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made

good by superior justice which looks only to the substance of the right, *without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and relations of private persons, equally subject to the same laws.*"

In the case of *Worcester v. George*, 6 Pet., the Court said:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, and to the conditions or tenor of the treaty, they should be considered as used only in the latter sense How the words of the treaty were understood by these unlettered people, rather than their critical meaning, should form the rule of construction."

In the case of *United States v. Kagama*, *supra*, this court said:

"These Indian tribes are wards of the Nation; they are communities dependent on the United States."

In *7th Op. Attys. Gen'l.* 746 July 5th, 1856, Mr. Attorney General Cushing said:

"They (Indians) are domestic subjects of the Government, and not sovereign constituent ingredients of it."

Their disabilities are clearly shown by the terms of the treaty of April 29th, 1868, between the United States and the various bands of Sioux Nations (15 Stats., 635) and the agreement relative to that treaty approved February 28th, 1879 (19 Stats. 256).

In *ex parte Crow Dog*, 109 U. S., at page 571, Mr. Justice MATTHEWS, speaking for the Court, said:

"It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free, though savage life, *from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil con-*

duct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, the habits of their lives, to the strongest prejudices of their savage nature."

In *The Kansas Indians*, 5 *Wall., at page* 758, Mr. Justice DAVIS said:

"It is argued because the Indians seek the Courts of Kansas for the preservation of rights and the redress of wrongs, sometimes voluntarily, and in certain specified cases by direction of the Secretary of the Interior, that they submit themselves to all the laws of the State. *But the conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people.*"

To the same effect as to the disabilities of tribal Indians are:

Cherokee Nation v. Georgia, 5 Pet., 1.
Worcester v. Georgia, 6 Pet., 315.
Elk v. Wilkins, 112 U. S., 94.
The Kansas Indians, 5 Wall., 737.
New York Indians, 5, Wall., 761.
Goodell v. Jackson, 20 Johns., 693.
Roche v. Washington, 19 Ind., 53.

The contention of the appellants here was recognized by counsel for Mr. Patrick in the court below, who, in his brief, stated: "From the well known condition of the Indians maintaining tribal relations, they are presumed to be wholly ignorant of our laws."

In the case of *United States v. Holliday*, 3 Wall., 49, the Court said:

"In reference to all matters of this kind, it is the rule of this Court to follow the action of the executive and other political departments of the Government, whose more special duty it is to determine such matters. If by those, Indians are recognized as a tribe, then by the Constitution of the United States, they are placed for certain purposes within the control of the laws of Congress."

Showing further the disabilities of these Indians, and the restrictions which encompass them, we refer to the regulations of one of the departments, recognized by the Court in the last cited case as having control in the matter.

The "Regulations of the Indian Department" for 1884, provides as follows:

"SEC. 492. Agents are instructed to notify the Indians under their supervision that they must confine their movements wholly within the limits of their respective reservations; that under no pretext must they leave the same without a special permit in writing from the agent, *and no such permit will be granted, except it shall be made to appear to the satisfaction of the agent* that the issuance of the same will inure to the benefit of the applicant or applicants, and will in event be likely to prove disadvantageous to the Indian service."

Then followed the form of such permit and the stub kept by the agents.

The same regulation is found in Section 237, Instructions of 1880. The circular of December 23d, 1878, also embraces the same regulation with the following provisions: "Whenever it shall be deemed necessary or judicious to grant to Indians a permit of the character above mentioned, an escort of police should accompany them." Other regulations, extending as far back as 1850, provide for ~~quite~~ much the same system of control and guardianship over tribal Indians.

We most earnestly contend that the ordinary rule of laches should not be applied by the Government to its wards, who, if they had any right to apply to the courts at all, could only do so by the permission of the Government, their guardian, and when an agent was satisfied it would inure to their benefit, and then under the surveillance of its armed police. The policy of the Indian administration has not been to inform these wards of the nation of their rights, but rather to forcibly impress upon them that they had none.

At the request of the Government, and for its benefit, the appellants parted with their chosen homes and the Government guaranteed to them other lands in lieu thereof. No State statute of limitations could operate against appellants with respect to their rights to such lands, the title being in the Government until the patent was issued; and, so far as Mr. Patrick is involved in the controversy, the patent being secured by him without the knowledge of Sophia Felix, he cannot urge the running of the statute of limitations or laches until the patentee has knowledge of the issue of the patent; as to the patentee, with respect to laches or the statute of limitations as against Patrick, the patent was not issued until the patentee received notice of the same.

The statute of limitations does not apply to or affect the appellants' right to bring this action.

McGannon v. Henry Straightlege, 32 Kansas, 524.
Gibson v. Chonteau, 80 U. S., 92.

Third. Sophia Felix and Appellants as Tribal Indians had no standing in the Courts of the land other than to be criminally prosecuted.

In the case of *Elk v. Wilkins*, 112 U. S., 99, Mr. Justice GRAY, speaking for the Court, said:

"The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, and state of pupilage resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State. General acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them."

A large number of authorities are cited by the learned Justice in support of this proposition. In the same case it was held that Indians were not "persons" within the meaning of the Fourteenth Amendment of the Constitution of the United States, unless they had become naturalized under acts of Congress specially granting such naturalization.

In the case of *United States v. Kagama*, 118 U. S., at page 384, speaking of tribal Indians, the Court say: "They owe no allegiance to the states, *and receive from them no protection.*" We quote further from the opinion as follows:

"In the case of *Worcester v. the State of Georgia*, above cited, it was held that, though the Indians had by treaty sold their land within that state, and agreed to remove away, which they had failed to do, the state could not, while they remained on those lands, extend its laws, criminal and civil, over the Indians; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the state and the process of its courts.

"The same thing was decided in the case of *Fellow v. Blacksmith et al.*, 19 How., 366. In this case, also, the Indians had sold their lands under supervision of the states of Massachusetts and New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York—which gave judgment for the plaintiff. But this court held, on writ of error, that the state could not enforce their removal, but the duty and the power to do so was in the United States. See also the *Kansas Indians*, 5 Wall., 737; *New York Indians*, 5 Wall., 761.

In the case of *ex parte Crow Dog*, 109 U. S., at page 568, Mr. Justice MATTHEWS, referring to the agreement embodied in the Act of 1877, in which it is declared "And Congress shall, by appropriate legislation, secure to them an orderly government. They shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life," said:

"The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the the very purpose of all these arrangements to induce and naturalize among them, was the highest and best of all, that of self-government; the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were, nevertheless, to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governing society. The laws, to which they were declared to be subject,

were the laws then existing, and which applied to them as Indians. * * * The phrase cannot, we think, have any more extensive meaning than an acknowledgement of their allegiance as Indians to the laws of the United States, made or to be made in the exercise of legislative authority over them as such."

In *Karahoo v. Adams*, 1 Dill., 347., the Court said:

"There is no provision in the Judiciary Act or any other act of Congress giving the courts of the United States jurisdiction in civil suits by or against Indians * * * This section (Sec. 11, Judiciary Act) of the act, makes no mention of Indians, and does not use the words 'foreign citizens or subjects', but instead thereof it gives the Circuit Court jurisdiction where an alien is a party, showing quite clearly that the framers of this famous statute understood the words of the Constitution, 'foreign citizens or subjects' to mean aliens and not resident Indians. * * * There is no act of Congress which undertakes to confirm jurisdiction in favor of an Indian not a citizen but resident within a State and against a citizen of the State."

In the case of *Brisco v. Southern Kansas Railway Company*, 40 Federal Reporter, 273, the Court held that the plaintiff's right to sue, he being an Indian, was based upon the act of Congress of July 4th, 1884, providing that the circuit and district courts of certain districts should have jurisdiction over all controversies arising between the Southern Kansas Railway Company and the Nations and Tribes or the inhabitants of such Tribes and Nations through whose territory the railway of such company should pass.

Many of the states have statutory enactments with respect to the Indians.

The Laws of New York, 1845, Ch. 150, Sec. 2, provides for the appointment by the Governor and Senate of an attorney for the Seneca Nation, who, among other duties, shall "prose-

cute and maintain all actions, suits and proceedings for them, or any of them, as he might find necessary or proper."

The laws of 1847, Ch. 365, Sec. 14, provide that any Indian of the Seneca Nation whose claims exceeded the jurisdiction of the "peacemakers" of the Nation may sue and be sued in the same manner and with like effect as between white citizens. In the case of *Senaca Nation v. Christie*, 126 N. Y., 122, the Court holds that the right of the plaintiff, an Indian, to sue in the State courts is dependent entirely upon statutory authority.

In the State of California there are statutory provisions with respect to the rights of the Indians before the law, and section 9, of the Act of April 22d, 1850, Laws of California, 822, makes it the duty of justices and other peace officers to instruct the Indians in such laws as relate to them.

Swan's Ohio Statute, 304, cited in *United States v. Yellow Sun*, 1 Dill., 271, as showing State jurisdiction over Indians, merely imposes a penalty for selling liquor to Indians in Ohio.

In *Clay v. State*, 4 Kansas, 49, the case involved only the question of jurisdiction over a military reservation of the United States for offenses therein.

In the case of *Jaha v. Belleg*, 105 Mass., 208, the Court holds that an Indian has no right to bring an action in his own name, and, if he has a right to bring an action at all, it is by a guardian or next friend.

In discussing the authority over Indians in the case of *Yellow Sun, supra*, the Court said (p. 277):

"It will appear, from these authorities and citations, that New York, Ohio and other States, have, at different times, passed acts declaring that their civil and criminal jurisdiction extended to Indians and Indian reservations, and that

such legislation has been considered valid when not in conflict with some treaty or constitutional act of Congress."

In *Prigg v. Com. Penn.*, 16 Pet., 617, it is decided that the legislation of Congress, if constitutional, must supersede all State legislation on the subject, and by necessary implication prohibit it.

In the case of *United States v. Paine*, 4 Dill., 381, the Court said:

"Where Indians maintain the tribal relations, their property is not subject to the laws of the State, or their estates to be administered upon in the Probate Court of the State, unless by the assent of the General Government."

And the Court held that the State Court had no authority to appoint an administrator of an Indian, unless he had been an allottee, under the treaty.

Article VIII of the treaty of 1867 (15 Stats. at Large, 536), provided as follows:

"Where allottees under the treaty of 1861 shall have died, or shall hereafter decease, such allottees shall be regarded, for the purposes of a careful and just settlement of their estates, as citizens of the United States, and of the state of Kansas; and it shall be competent for the proper court to take charge of the settlement of their estates under all the forms, and in accordance with the laws of the state as in the case of other citizens deceased."

In the case of *Kansas Indians*, 5 Wall., 755, Mr. Justice DAVIS said:

"If the tribal organization of the Shawnees is preserved intact and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union.

"If under the control of Congress, from necessity, there can be no divided authority. If they have outlived many

things, they have not outlived the protection afforded by the Constitution, treaties and laws of Congress. * * * There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of the States on condition that the Indian rights should remain unimpaired, and the general Government at liberty to make any regulation respecting them, their lands, property or other rights which it would have been competent to make if Kansas had not been admitted into the Union."

And again at page 755:

"It is insisted, as the guarantees of the treaty of 1831 are not, in express words, reaffirmed in the treaty of 1854, they are, therefore, abrogated, and that the division of the Indian Territory into separate estates, so changes the status of the Indians that the property of those who held in severalty is liable to State taxation. It is conceded that those who hold in common cannot be taxed. If such are the effects of this treaty they were evidently not in the contemplation of one of the parties to it, and it could never have been intended by the Government to make a distinction in favor of the Indians who held in common, and against those who held in severalty. If the Indians thus holding had less rights than their more favored brethren, who enjoyed their possessions in common, and in compact form, would not good faith have required that it should have been so stated in the treaty? The general pledge of protection substantially accorded in this treaty, as in all other treaties with this tribe, forbids the idea that Government intended to withdraw its protection from one part of the tribe and extend it to the other."

Indians can testify only when specially authorized by legislation.

There are numerous acts of Congress granting to Indians the qualification to testify.

Section 9 of the Bill of Rights of the Constitution of Nebraska of 1866 was as follows:

"All Courts shall be open, and every person, for any injury done to him in his lands, goods, person or reputation, shall

have a remedy by due course of law, and justice administered without delay or denial."

Section 13 of the Bill of Rights of the present Constitution is to the same effect. Under this provision of the Constitution it is claimed by the appellees that the Courts of Nebraska were open to appellants; that they came within the meaning of the word "person."

In the case of *Elk v. Wilkins, supra*, this Court held that an Indian, not a citizen, was not a "person" within the meaning of the Fourteenth Amendment to the Constitution, and holds further that the general acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.

When the patent was issued to Sophia Felix for the land in controversy, Nebraska was not a State, but was a territory under the exclusive jurisdiction of the General Government, and when Nebraska became a State it pledged that it should accept and respect the status of Indian tribes. There is no legislation of the State of Nebraska in any manner indicating that the "person," in the section of the Bill of Rights before referred to, was intended to include Indians bearing tribal relations. If it should be held that this section of the Bill of Rights of the Constitution of Nebraska includes within the word "person" an Indian, then such Indian would enjoy the anomalous distinction of being, for the purposes of State jurisdiction, a "person," and for the purposes of Federal jurisdiction, *not* a "person," and thus, without sharing in the privileges and benefits of either condition, he would have to suffer the pains and penalties of both. We submit that with respect to tribal Indians the holding of the Federal Courts must obtain

and control, and that such Indian is not a "person" in the ordinary use and meaning of that term, and not to be included in general acts relating to "persons," unless specifically named.

But even if the Indians were "persons" within the meaning of the section of the Bill of Rights of the Constitution of Nebraska herein referred to, they are, nevertheless, persons laboring under disabilities, peculiar to themselves, as hereinbefore specifically pointed out, and against which the state of Nebraska could afford no relief. It could not make them citizens. It could not give them authority to stir one foot without their reservations, nor to come into its courts, even were they open to them. It could not control the judgment of the "agent" as to whether it was for their benefit, nor remove the armed police guarding and guiding their movements; it could not authorize them to execute a bond for security for costs for any action, nor encumber their property in any manner whatever; it could not withdraw them from the control, management and protection of the United States, in their condition of wardship, and could not in any other manner affect their legal status.

In this behalf we invite the attention of this court to a bill now pending before the Congress of the United States entitled 'A Bill to Establish Courts for the Indians on the various reservations and to extend the protection of the laws of the States and Territories over all Indians and for other purposes. (50th Congress, First Session, S. 2541.)

1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all Indians not citizens of the United States, whether residing on or off a reservation, are hereby declared entitled to

the full protection and exemptions secured by the Constitution of the United States to persons other than such citizens; and especially they shall be entitled to the equal protection of the law; they may sue and be sued in all Courts; and shall have full power to make contracts, and engage in any trade or business; provided, however, that such reasonable restraint as is necessary to the maintenance of the reservation system is not forbidden, nor shall this section work a repeal by implication of any laws which may be necessary to such reasonable restraint * * * of the following enumerated acts or any part thereof, namely: * * *

SEC. 3. That the laws, both civil and criminal, existing at the time of the passage of this act, of the State or Territory in which any Indian reservation is situated, are hereby extended over every such reservation, so far as said laws are applicable, and not inconsistent herewith, or relating to subjects herein provided for; and the laws, both civil and criminal, existing at such time or hereafter made, of the State of Kansas, are hereby extended over any Indian reservation situated in the Indian Territory, except as hereinafter specially excepted; but the President of the United States may, at any time within six months from the passage of this act, or within six months after a certification by the Court Commissioner of any such laws as are prejudicial or inapplicable, by his veto, of which proclamation shall be duly made, forbid the application to any reservation of any such laws which he may deem prejudicial to the welfare of the Indians to be affected by the same. * * *

SEC. 9. That the United States Circuit Court shall appoint for each agency within the circuit an officer learned in the law and to be known as the next friend, and who shall perform in behalf of the Indians at such agency the duties hereinafter named. * * * He may institute suits and prosecutions on behalf of Indians, or defend the same at the request of any Indian, and without such request, by leave of the commissioner or judge of the court in which the action or prosecution is brought. He shall act as district attorney or prosecuting officer in the agency for which he is appointed. The United States Circuit Court shall have jurisdiction of all complaints against any next friend, and may, for grave neglect, incompetency or maladministration remove him from office and appoint a successor in his place. * * *

As a bill pending and under consideration, this points to an understanding as to the present legal status of the Indian; but even now, in the year 1892, it is only contemplated to give the Indian an opportunity to sue by a next friend. The State of Nebraska has never legislated with a view to asserting civil jurisdiction over tribal Indians.

Fourth. The Allegations of the Bill of Complaint are in all respects sufficient.

Objection was taken in the court below to the sufficiency of the allegations of the bill because it failed to set forth:

"1st. How or why the complainants came to be so long ignorant of their rights.

"2nd. The means used by defendant to keep them in ignorance.

"3rd. How they first came to the knowledge of their rights."

These objections have been fully answered, we think, under the different headings in the foregoing brief. The appellants were so long ignorant of their rights on account of the disabilities surrounding them as tribal Indians, as alleged in the bill. The means used by defendant Patrick to keep them ignorant were by failing to inform them that he had possession of the scrip which he knew had been wrongfully taken from them; in failing to inform them that he had secured the blank deeds and power of attorney referred to; in failing to inform them that he had filled up the blanks and located the land; in failing to inform them that he had received the patent and had secured a conveyance to himself. It is insisted by Patrick

that "concealment by silence" is not sufficient, but here Patrick was the acting party; he did and performed himself the transactions which he concealed and about which he maintained silence; the wronged parties were hundreds of miles away, and under guard; they could neither read nor write; their environments were such that Patrick knew there was scarcely a probability that his procedure to acquire, for his own use and benefit, their property, would come to their knowledge. Under these circumstances, "concealment by silence" was a part and parcel of the rankest fraud. It is true these fraudulent documents were recorded in Omaha; but their character and the circumstances under which they were fabricated destroy their effect as notice to the grantors. They never made Ruth their attorney, nor Patrick their grantee. The demurrer admits that Patrick himself did this; the deed executed by Ruth was not their deed, for they had never empowered him, or any one else, to convey this land of which they had no knowledge. The deeds and power of attorney were spurious, and no better than forgeries.

Now to hold that the recording of such documents is notice to anyone, much less an ignorant Indian residing in another State, would be a cruel mockery of justice.

The bill further alleges that Patrick made his father, J. Patrick, his agent in the premises, and his agent in attempting to secure additional title from the Garnelles. A letter of J. Patrick, the father, in the prosecution of said endeavor, is made a part of this bill, in which it is stated, among other things: "You will see Mr. Steele or Mr. Collom, or either or both, as in your judgment may be best, and have a feeler thrown out, *without giving the parties any particular inform-*

ation." The parties here referred to are the parties defrauded as alleged in their bill.

The question is not as to *how* the appellants first came to a knowledge of their rights in the premises, but *why* they did not come to that knowledge sooner, and this is fully stated in the bill.

The bill states the time the fraud was discovered, and we submit that the bill is clearly within the rule invoked by Patrick, as laid down in *Wollensack v. Reiher*, 115 U. S., 101, that "the particular acts of fraud or concealment should have been set forth by distinct averments, as well as the time when discovered, so that the Court may see whether, by the exercise of ordinary diligence, the discovery might have been before made."

Fifth. Expatriation and citizenship of Indians.

It was contended by counsel for Mr. Patrick in the court below, that it was at all times in the power of tribal Indians to relieve themselves of their disability by expatriating themselves; that they could then have come into the courts; further, that they were bound to do so or else suffer the consequences of such neglect.

One word, first, with respect to taking and holding by allotment. The process of alloting in severalty to Indians was one entirely under the supervision and management of the General Government, and with respect to which management and rules, the Indians were firmly bound.

With respect to expatriation, Mr. Justice GRAY, in the case of *Elk v. Wilkins, supra*, said:

"The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States, except under explicit provisions of treaty or a statute to that effect."

And again at page 103:

"The treaty of 1867 with the Kansas Indians strikingly illustrates the principle that no one can become a citizen of a nation without its consent."

At page 106 it is further said:

"But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of a state of pupilage and admitted to the privileges and responsibilities of citizenship is a question to be decided by the Nation whose wards they are, and whose citizens they seek to become, and not by each Indian himself."

In *United States v. Osborne*, 6 Sawyer 406, the Court said:

"The Indian cannot make himself a citizen of the United States without the consent and co-operation of the Government. The fact that he had abandoned his nomadic life or tribal relations and adopted the habits and manners of civilized people may be a good reason why he should be made a citizen of the United States, but does not of itself make him one."

In *Elk v. Wilkins*, *supra*, the Court said:

"The recent statutes concerning homesteads are quite inconsistent with the theory that Indians do or can make themselves independent citizens by living apart from their tribes."

The general statutes of naturalization do not apply to Indians.

Article 6 of the treaty of April 29th, 1868, contains among other things the following:

"And any Indian or Indians receiving a patent for land, under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States and be entitled to all the privileges and immunities of such citizens, and shall at the same time retain all his rights to benefits accruing to Indians under this treaty."

Whatever construction may be placed upon the Act of July 27th, 1868, regarding the expatriation of tribal Indians, the treaty of April 29th, 1868, and the agreement of February 28th, 1877, were the measures expressly adopted by Congress for conferring citizenship upon the bands of the Sioux Nation of Indians, to one of which said Sophia Felix and appellants belonged.

As we have stated, the fact that they only became citizens in the year 1887 is not evidence of negligence and laches upon their part, but rather evidence that the Government under whose guardianship and control they were, did not, in the exercise of its sound discretion, deem them fit for such responsibilities any sooner. The progress of making citizens of Indians has been confessedly a slow and difficult one.

VI.

THE DUTY OF THE GOVERNMENT WITH RESPECT TO ITS GUARDIANSHIP OVER THE INDIANS, AND THE PROTECTION OF THEIR PERSONS AND PROPERTY, DID NOT CEASE UPON THE ISSUE OF THE SCRIP.

The learned Judge who decided the case below, states in the opinion:

"Knowing as we do, how land scrip passed in the market, the only fair understanding of the facts, as disclosed by the bill, is that this scrip was wrongfully obtained from Sophia

Felix, and placed on the market, and that defendant seeking scrip wherewith to enter his land, found and purchased this."

We most respectfully submit that the duty of the Government toward its wards was the same *after* the issue of the scrip as *before*, at least until such time as allotment took place, and the Government conferred upon the Indian the protection attaching to citizenship of the United States. If it be true that this scrip was permitted to go "on the market," and that persons, including Patrick, "found and purchased" it, then the Government, through its agents, utterly failed in their duty in protecting the property rights of the wards of the Nation, under the treaty and the laws of Congress applicable to this situation.

This scrip under the law could not go "on the market," and could not be "purchased" by Patrick, and he knew it. Under the Act of 1854, Sophia Felix parted with her share in the common tribal property, in "*exchange*" for other *lands*, not scrip, of a like amount, and it was the duty of the Government to see that she secured the *lands* thus received in "*exchange*," for that turned over to the United States. It was not the intention of Congress, that, when the scrip was issued, these wards of the Nation, these pupils—savages, if you please—without any knowledge of the laws of the Nation, which held them in the palm of its hand; without any knowledge of their rights; without any knowledge of the land laws; whose every movement was circumscribed by the most arbitrary rules, should have their lands taken from them, and be sent forth into the world, with a scrap of paper, the very contents of which they were unable to read, and the purpose and objects of which were unknown to them and become the prey of

unscrupulous land speculators—Indian traders—and, unfortunately, of greedy Indian Agents—faithless servants of the Government.

This is not the "*exchange*" contemplated by Congress; this is not the *exchange* contemplated by the treaties and the laws; this is not the "*equality of exchange*" recognized as essential in the law. In the case of the *Kansas Indians, supra*, this Court, speaking by Mr. Justice DAVIS, held that after Indians took and held in severalty, they were entitled to the same protection, and the same rights, as they had when possessing in common and in compact form. Speaking of these allottees the learned Justice said:

"If the Indians thus holding had less rights than their more favored brethren, who enjoyed their possessions in common, and in compact form, would not good faith have required that it should have been so stated in the treaty? The pledge of protection substantially accorded in this treaty, as in all other treaties with this tribe, forbids the idea that the government intended to withdraw its protection from one part of the tribe and extend it unto the other."

If it was the intention of the government that the lands of Sophia Felix should be taken in *exchange* for a scrap of paper, would not good faith have required that she, uneducated, untutored, a pupil and a ward, should at least be informed of *the value and purpose of that piece of paper?* Nay, more; was it not as much the *duty* of the government to protect her in that paper as it was before that to protect her in the land she had parted with? Under the laws and treaties before referred to, it was provided:

"Whenever any Indian, being a member of any band or tribe with whom the government has, or shall have, entered

into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe *shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the land so allotted to him.*"

These requirements of Congress were evidently overlooked by "the agents and superintendents of such tribe," in the case of Sophia Felix.

Certainly the Indians understood that they were still under the guardianship of their Great Father, and it would be repugnant to the National conscience, and every sense of honor, to withdraw that protection. The 9th section of the Act of April 22nd, 1850, of the laws of California provides for and makes it the duty of justices and other peace officers to *instruct the Indians in such laws as relate to them.* Did the duty of the General Government in the capacity as guardian require less? In the case of the *Kansas Indians* above referred to, the Court said:

"How far the powers of the President or Congress extend under this article, it is unnecessary to discuss or decide. It is sufficient to say that it leaves the Indians, most clearly, under the protection of the general government, and withdraws their property from the jurisdiction of Kansas."

We assert, *and most emphatically*, that it was the *duty* of the Government, from every consideration arising from a forcibly assumed guardianship, to see to it that Sophia Felix, its ward, received the *land*, and knew where it was and its description, for which, under compulsion, she gave in exchange her birth-

right, and not leave her naked and alone, to be utterly despoiled of her rights by a band of prowling foragers.

It shocks the conscience to contemplate a direct beneficiary of this robbery, urging the failure of the Government to perform its sacred duty of protection to its ward, as a conclusive reason for retaining the spoils, and to bar the wronged and robbed of any right to plead for restitution in the courts of that same Government and guardian. Within the lifetime of men still living, a vast and mighty people have nearly disappeared from the face of the earth, and in a few short years the great domain they possessed and owned will know them no more forever: In that chapter of the history of a great and powerful Nation which shall record the lives of these tribes, the gradual but certain extinction of these unfortunate people, there will be but *one page* to which the public can turn without a keen sense of wrong and shame, if not a compunctious throb of sorrow and regret, and that is the leaf upon which shall be transcribed the decisions and principles announced by this Court. Elsewhere will be found *might*, but here will be found *justice*.

Judging of the future by the past, these unfortunate appellants may rest secure upon the principles established there for a restoration to them of the lands, now so wrongfully withheld, and which, in a compulsory exchange, the nation pledged to their sister.

J. C. COWIN,

J. H. PARSONS,

Solicitors and of Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

TERM No. 301.

PIERRE FELIX, ELIZABETH FELIX, LOUIS ROBINETT, HARRIET ROBINETT, DENNIS FELIX AND MARGARET FELIX, APPELLANTS,

vs.

MATTHEWSON T. PATRICK, MARY PATRICK, R. W. CLAYTON, HARRY B. MULFORD, THE OMAHA HORSE RAILWAY COMPANY, ALGERNON S. PATRICK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR DEFENDANTS.

MATTHEWSON T. PATRICK, HARRY B. MULFORD, ALGERNON S. PATRICK, CALVIN H. FREDERICK, HELEN A. FREDERICK, DENNIS H. ANDREWS ELOF NILSON AND THE OMAHA RAILWAY COMPANY.

JNO. L. WEBSTER,
Solicitor for Defendant Patrick and others.

REES PRINTING CO., OMAHA.

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STATEMENT OF THE CASE.

Complainants say that Sophia Felix, in 1854, was a half-breed or mixed-blood of the Sioux or Dacotah Nation of Indians, then residing in Minnesota.

Under and by virtue of the Treaty of Prairie Du Chien, made July 15, 1830, and an act of Congress approved July 17, 1854, entitled "An act to authorize the President of the United States to cause to be surveyed a tract of land in the Territory of Minnesota, belonging to the half-breeds or mixed-bloods of the Dacotah or Sioux Nation of Indians, and for other purposes," Sophia Felix was entitled to have issued to her by the Government of the United States, scrip for the location of 480 acres of land, as provided by that act. (See Vol. 10 U. S. Statutes at Large, p. 304.)

Thereafter, in the year 1857, the United States, through its proper officers, issued to Sophia Felix Certificate No. 181, Letters A and B for 40 acres each, C for 80 acres, D and E for 160 each.

Afterwards, and before the the location of said scrip, Sophia Felix married David Garnelle.

After said marriage, and on the 31st day of March, 1860, some person *to the complainants unknown*, by fraudulent means, procured the said Sophia Felix and her husband, Garnelle, to execute a certain Power of Attorney in blank, and also a quit-claim deed in blank, which instruments were afterward fllled in with the description of the property in controversy.

There is no averment that any of the defendants were parties to this transaction.

That afterwards in the month of November, 1861, the defendant, Matthewson T, Patrick, procured from some persons, to the plaintiffs unknown, the possession of a portion of said scrip, to-wit: Letter A, for forty acres and Letter C, for eighty acres.

On the 21st day of November, 1861, said Matthewson T. Patrick in the name of Sophia Felix made application to the United States land office at Omaha to locate said scrip and did locate the scrip upon the land in controversy, but in the name of Sophia Felix.

Complainants say that at the time of said location said Sophia Felix had not parted with her title to said scrip and was the absolute owner thereof, and that said Matthewson T. Patrick then well knew these facts, whereby the location inured wholly to the benefit of said Sophia Felix, *although she had no knowledge that Patrick had procured possession of the scrip, or that he had located the same.*

Complainants further say that Patrick secured the possession of the scrip with intent to appropriate the same to his own use and to defraud the said Sophia Felix out of all interest therein or benefits thereunder, and located the same for his own use and benefit.

Complainants further say that on or about the 21st day of November, 1861, the defendant, Matthewson T. Patrick, secured the blank Power of Attorney and blank quit-claim deed and caused the quit-claim deed to be filled out with a description of the property in controversy, and his own name as grantee, and caused the power of attorney to be filled in with the name of William Ruth as attorney and with a description of the land in controversy.

THAT THE "SAID MATTHEWSON T. PATRICK THEREAFTER "TO-WIT: ON THE 7TH DAY OF SEPTEMBER, 1863, CAUSED "THE SAID PRETENDED POWER OF ATTORNEY AND QUIT-"CLAIM DEED HEREINBEFORE DESCRIBED TO BE FILED FOR

"RECORD IN THE RECORDER'S OFFICE OF DOUGLAS COUNTY, "IN THE THEN TERRITORY OF NEBRASKA, AND WHICH "INSTRUMENTS WERE ON THAT DAY RECORDED IN BOOK P. "OF DEEDS AT PAGES 48 AND 50 RESPECTIVELY.

(Record p. 3, folio 5).

That William Ruth, as attorney in fact, July 25th, 1863, made and delivered to Matthewson T. Patrick a WARRANTY DEED for said land. (Record p. 4, folio 6, and ex. C, Record p. 16.)

SAID DEED WAS RECORDED JULY 25TH, 1863, IN OFFICE OF REGISTER OF DEEDS, DOUGLAS COUNTY, NEBRASKA. BOOK O, p. 632.

(Record p. 4, folio 6, ex. C., p. 16.)

Complainants further say that *at or before* the location of said scrip, the defendant *Patrick was in the possession of the land* upon which the scrip was located and that said location was made by said Patrick *designedly for his own benefit and to acquire title to said tract of land*, which title he could not acquire by virtue of the acts of Congress with respect to pre-emption.

Complainants further set forth the act of the Congress of the United States, approved February 2d, 1869, entitled "An Act to Confirm the Titles to Certain Lands in the State of Nebraska." (Record p. 4, folio 7).

That Matthewson T. Patrick never informed complainants that he had procured and located said scrip or that said deeds of conveyence had been made to him, but

" fraudulently concealed the same and exercised every precaution " to prevent knowledge coming to them. (Record p. 4, folio 7).

No facts are recited to support or justify these charges of fraud and concealment.

Said complainants further say that no consideration whatever moved to, or was received by, said Sophia or David Garnelle, or either of them, directly or indirectly, for said scrip, the execution of said papers, or for the property above described, and that said Matthewson T. Patrick has claimed and asserted ownership in said premises ever since the location of said scrip, under and by virtue of said location, and the instruments hereinbefore described, and still asserts such ownership and title. (Record p. 5, folio 8).

Complainants further say that a *large part of said land has been platted and recorded as Additions to the City of Omaha,* and divided into lots, blocks and streets. And that Matthewson T. Patrick *has sold a large number of said lots* and other of said property, and given his warranty deed and other instruments of conveyance therefor. (Record p. 5, folio 8).

Complainants further say that on *the 3d day of July,* 1863, the United States issued to said Sophia Felix its patent for the above described premises, and that said *patent was filed for record in the Recorder's office of Douglas County, in the then Territory of Nebraska, on or about the 25th day of July,* 1863. (Record pp. 6, 7 and 8).

Complainants further say that Sophia Garnelle died on or about the 25th day of December, 1865, and that during her lifetime she had no knowladge of the matters and things in said bill alleged to have been done by said Matthewson T. Patrick in the securing and locating of said scrip and in the procurement by said Patrick of the title to said property.

Complainants further say that David Garnelle died in the year 1882; that the mother of said Sophia Felix died about the year 1865, and that the father of said Sophia Felix died on the 22d day of October, 1876, and that neither the father, mother or husband of said Sophia Garnelle had any knowledge whatever of the facts in said bill set forth with respect to the acts and doings of said Patrick concerning said scrip and real estate.

Complainants further say that Sophia Felix died intestate and without issue surviving her; that her father died intestate, and that the complainants are brothers and sisters of the full blood of said Sophia Felix and her sole heirs and the sole heirs of her said father; that the complainants had no knowledge whatever of the issue, disposition or location of said scrip, or of any fact or allegation in said complaint set forth in respect to the acts of said Patrick concerning said scrip and real estate, until the year 1887.

Complainants further say that on the 29th day of August, 1887, said complainants accepted allotment of lands made to said complainants under and by virtue of a treaty between the United States and the several tribes of the Sioux Indians throughout the United States, entered into

on the 29th day of April, 1868, and thereupon, that is to say, the 29th day of August, 1887, said complainants became citizens of the United States for the first time; that during all the time of their several existence, before said 29th day of August, 1887, the complainants maintained tribal relations as members of the band known as the Santee Sioux, of the Sioux Nation of Indians, and that up until said last mentioned date said complainants were inhibited and barred from instituting and maintaining any action at law, or in equity, in any of the courts, Federal and State, in the United States.

Complainants further say that said Patrick and the other persons and corporations claiming under him, ought not to be permitted to have, occupy, hold or enjoy, said real estate, but ought to surrender the same to the complainants, and submitting as the ground therefor: "That said scrip under the treaty of Prairie Du Chien proclaimed February 1st, 1831, and said Act of Congress of July 17th, 1854, could not be sold, assigned or transferred directly, or by any indirection; that Mattewson T. Patrick received said scrip in trust for said Sophia Felix; that he located the same in trust for her; that he took possession of the lands so acquired by said scrip and held and still holds the same as trustee for her, and her rightful heirs, and he ought not to be allowed to assume any adverse or hostile relation, either by the fraud and fraudulent instruments aforesaid or otherwise, to your orators, the lawful heirs of said Sophia Felix, and the lawful heirs of her father, Pierre Felix; and your orators insist that he also ought to account to your orators for the reasonable rents, issues and profits of said land for

all the time he has had possession thereof, as the same shall appear on an account to be taken and stated by one of the masters of this Court. And your orators ought to be adjudged free from laches in the premises and in bringing this their action, owing to the ignorance of your orators with respect to the wrong and fraud aforesaid, their peculiar personal circumstances and situation and their legal disabilities."

To this Bill the defendants filed a demurer, which was sustained and Bill dismissed.

(See opinion by Brewer C. J. (pp. 24 to 28.)

From the decree dismissing the Bill complainants appealed to this court.

BRIEF.

The Action is Barred by Lapse of Time and Laches on the Part of the Complainants.

I.

This Defence may be Made and Had on Demurrer.

In Lansdale vs. Smith, 106 U. S. 391, it was said by HARLAN. J., "A defence grounded upon the staleness of the claim asserted, or upon the gross laches of the party asserting it, may be made by demurrer, not necessarily by plea or answer."

In Maxwell vs. Kennedy, 8, How., 210, TANEY C. J., said, "The proper rule of pleading would seem to be that when the case stated by the bill appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it on demurrer. And as the laches of the complainant is a bar in equity, if the objection is ap-

parent on the bill itself, there can be no good reason for requiring a plea or answer to bring it to the notice of the court."

Statement of Laches

(*a.*) The scrip was issued to Sophia Felix in 1857, thirty-one years before bringing suit. (Page 2 of Record.)

(*b.*) The Power of Attorney to Ruth and Quit Claim Deed to Defendant, Patrick (Exhibits "A" and "B" to Bill of Complaint), were made March 31st, 1860—28 *years before bringing this suit* — and were recorded September 7, 1863. (pp. 12-14-15 Record.)

(*c.*) The scrip was located on the lands in controversy November 21st, 1861, through the United States local Land Office at Omaha—27 *years before the bringing of this suit.* (P 2, folio 3 of Record.)

(*d.*) The Patent from the United States in the name of Sophia Felix for these lands bears date July 3d, 1863 (*Exhibit "D" to Bill*), *and was recorded July* 25, 1863. (pp. 8–17, Record.)

(*e.*) The warranty deed from Sophia Garnelle, otherwise Sophia Felix, and David Garnelle, bears date July 25, 1863, and was recorded same date—25 *years before bringing this suit.* (Exhibit "C" and p. 16, Record.)

(*f.*) At and before the location of the scrip on these lands, defendant was in possession thereof, November 21, 1861 (Page 4), and has ever since claimed and asserted ownership in said premises under said location and the instruments of conveyance above set forth (Folio 9 of Bill) 27 *years of adverse possession.*

(*g.*) The land lies within the City of Omaha, and has been platted as additions to the city. A large portion has been sold as lots under deeds of warranty, and Defendant, Patrick, is in possession of parts not sold, and the various purchasers are in possession of parts so sold. (Folios 9 to 12 of Record).

(*h.*) The scrip was located on the lands in 1863, and under the rules of the General Land office this scrip was forwarded to the General Land office at Washington and any inquiry there, the place where such inquiry should have been made, would have disclosed its location on these lands. *No reason is given why an inquiry was not so made by the complainants, or by Sophia or David Garnelle.*

(*i.*) On these lands there were at the bringing of this suit 1,000 dwelling houses occupied by families, a large number of store houses, street car tracks and stables and barns connected therewith, many miles of streets and alleys, with water and gas mains. Mere ignorance of title is no sufficient excuse for disturbing these titles at so late a day.

(*j.*) These complainants had the means of knowing that Sophia Felix was entitled to have and receive from the United States the scrip in the Bill described, and must be held to have known the terms of the treaty of "Prairie Du Chien" and of the act of Congress of 1854, and to have remained in ignorance for so many years is of itself great laches.

(*k.*) There is no averment that complainants at any time *ever made any attempt to discover any of the facts or frauds complained of in the bill.*

(*l.*) There is *no averment of any act or thing done by*

defendants to keep the complainants so long in ignorance of the matters complained of, or of any frauds practiced by defendants to keep them in ignorance.

(*m.*) There is *no disclosure* in the bill *why* the complainants for so long a time remained ignorant of their rights, *or as to the manner in which they, at so late a day, came into possession of the knowledge they now claim to have.*

(*n.*) There are *no averments* in the bill showing *any diligence* on the part of complainants, either in searching for the discovery of the frauds complained of or in the bringing of this suit.

II.

Courts of Equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except in rare cases.

This bill is drafted upon the theory that Patrick and his co-defendants held these lands as trustees for complainants. This form of the pleading is coupled with certain charges of fraud, evidently with the hope that thereby the Statute of Limitations may be escaped and the doctrine of Laches, as announced and administered by courts of equity, avoided.

Under the Statute Laws of Nebraska an action to recover the *title* or *possession* of lands must be brought within *ten years* after the cause of action accrued. (Sec. 6 of Code.) (See appendix.)

Want of knowledge on part of complainants of facts which would have sustained an action will not prevent the

running of the statute. Welton vs. Merrick County, 16 Neb., 83.

In order to avoid the Statute of Limitations and the doctrine of Laches, complainants must clearly establish the trust and must set forth and prove WHEN they first discovered the fraud complained of, HOW they came to discover the fraud, or why they so long remained ignorant, and what ACTS OF CONCEALMENT the defendants were guilty of which prevented the discovery of the fraud at an earlier day. All these elements, which must appear, to avoid the statute, are omitted from the Bill. From the statement of the case we have an antiquated demand—an effort to establish a stale trust—which would, if established, disturb the peace of society in the neighborhood and destroy the homes of a large number of our citizens, and deprive them of their property.

As said by His Honor Justice BREWER (p. 25, folio 41.):

"The tract lies, as herein before stated, within the limits "of the city of Omaha; has been platted into lots and blocks "and large numbers of lots sold to individuals, many of "whom are joined as parties defendant. It has become of "immense valuworth, as stated by counsel, from a million "to a million and a half dollars."

The language of MR. JUSTICE BREWER in United States vs. Des Moines & C. Company, 142 U. S. 538 may well apply to this case.

"There has been long delay in presenting this claim. A "third of a century has passed since the State conveyed to "the Navigation Company, and more than a quarter of a "century since Congress relinquished and granted to the

"State, the title to these lands. During that time there "have been marvelous changes in the population, the in- "dustries, the business interests of the State; legislatures "and courts have been busy determining rights and estab- "lishing relations based on the vesting of title in the Navi- "gation Company. A proposition to destroy this title, and "to put at naught all that has been accomplished in respect "thereto and based thereon during these years, is one which "may well make us pause."

Every argument that can be urged to justify the bringing of this action as this late has been answered by this Court time and time again. This is not a case where the facts constituting the fraud appear of record.

Proof of fraud must rest in parol

Under the case as made in the Bill, the Court must look to the frail memory or active imagination of ancient witnesses, who may not be able, after a great lapse of time, to distinguish between their faith and their knowledge, between things seen or heard by themselves, and those received from family or neighborhood gossip, or upon that most unsafe of all testimony, conversations and confessions —remembered or imagined—partially stated or wholly misrepresented," as said by Mr. Justice GRIER in Badger vs. Badger, 2 Wall., 93, to prove the following allegations:

1. That some unknown person procured Sophia Felix, and her husband, Garnelle, to execute a blank power of attorney.

2. That some unknown person procured Sophia Felix, and her husband, Garnelle, to execute a quit claim deed in blank.

3. That these instruments were afterwards filled out by some other person unknown.

4. That Sophia Felix had not parted with her title to said scrip.

5. That Patrick procured the scrip, not from Sophia Felix, but from some person unknown.

6. All these things, too, not to be proved by Sophia Felix and Garnelle, as they each have been dead many years.

7. All these facts, which lie at foundation of complainants' rights, are to be proved by secondary evidence, in an uncertain manner, so aptly put in the foregoing quotation.

Lapse of Time.

The events above mentioned took place in in 1860, 1861 and 1863, now a 1/3 century ago. The claim is antiquated. To now allow it would work hardship and injustice to others. A Court of Equity should not entertain it. In Badger vs. Badger, 2 Wall., 94, this Court said:

"But there is a defence peculiar to courts of equity "founded on lapse of time and the staleness of the claim, "where no statute of limitation governs the case. In such "cases, courts of equity act upon their own inherent doc- "trine of discouraging, for the peace of society, antiquated "demands, refuse to interfere where there has been gross "laches in prosecuting the claim, or long acquiescence in "the assertion of adverse rights. Long acquiescence and "laches by parties out of possession are productive of much "hardship and injustice to others, and cannot be excused "but by showing some actual hindrance or impediment,

" caused by the fraud or concealment of the parties in posses-
" sion, which will appeal to the conscience of the chancellor.
" 'The party who makes such an appeal should set forth
" in his bill specifically what were the impediments to an
" earlier prosecution of his claim; how he came to be so long
" ignorant of his rights, and the means used by the respond-
" ent to fraudulently keep him in ignorance; and how and
" when he first came to a knowledge of the matters alleged
" in his bill; otherwise the chancellor may justly refuse to
" consider his case, on his own showing, without inquiring
" whether there is a demurrer or formal plea of the Statute
" of Limitations contained in the answer.'"

See also:

Godden vs. Kimmell, 99 U. S., 201.
Hayward vs. National Bank, 96 U. S., 611-17.
Richards vs. Mackall, 124, U. S., 183.
Mackall vs. Casilear, 137, U. S. 556.

III.

Want of Diligence and Ignorance of the Fraud.

NO SUFFICIENT REASONS ARE SET FORTH IN THE BILL OF COMPLAINT WHY THEY REMAINED IGNORANT OF THE LOCATION OF THE SCRIP ON THE LANDS IN CONTROVERSY, AND OF THE EXISTENCE OF THE INSTRUMENTS OF CONVEYANCE UNDER WHICH PATRICK DERIVED HIS TITLE.

Sophia Felix received the scrip from the proper officers of the United States in the year 1857. (Folio 4 of Bill.) This scrip passed from her possession and came into the possession of Patrick in 1861.

She and her husband, David Garnelle, knew this scrip had passed from her possession in 1861, yet Sophia lived until December 25, 1865, and her husband, David Garnelle, until 1882. (Folio 15 of Bill.) There is no averment in the bill that either Sophia or her husband, David, ever made an attempt to discover what had become of the scrip or what use, if any, had been made of the instruments they executed, to-wit: the Power of Attorney or the Quit Claim Deed.

The complainants for themselves simply aver that they had no knowledge of the *issue, disposition or location* of said scrip or of any fact or allegation set forth relating to the conduct of said Patrick concerning said scrip or said real estate.

This case stands, therefore, as if Sophia Felix knew of the fraud and never made any inquiries or efforts looking toward a recovery of her rights, and the complainants after her death remained passive.

Sophia Felix must have known that the scrip had parted from her. Yet she never searched for it, or in any manner sought to recover it. Her husband and father, and mother and brothers and sisters must have known that she had received this scrip and that it had passed from her hands in some way, yet no one of them ever inquired about it.

The use of this scrip by Patrick, or any one else, might have been avoided by giving notice to General Land Office. Any inquiry at General Land Office, after November 21st, 1861 (31 years ago), would have brought the information that it had been located on the lands in controversy.

A like inquiry would have disclosed the issue of the Patent, and led to a discovery of these lands and the state of the title.

Garnelle joined with Sophia Felix in the power of attorney and quit claim deed. There is no claim that they were ignorant of what they were doing, when they executed these instruments.

They must be presumed to have known the import and effect of these instruments, when they executed them March 31st, 1860 (32 years ago), yet they never complained, nor inquired what use had been made of them.

Sophia Felix did not die for more than five years afterward, December 25th, 1865, and Garnelle lived until 1882, 22 years. (Folio 14 Record.)

The father aud mother of Sophia Felix lived many years afterward. (Father died 1876, p 9, Record.) Yet there is no averment they were ignorant of the execution of the Deed and Power of Attorney, Presumably, therefore, they each knew of these instruments, yet they never inquired what use was made of them, hence must be bound by the doctrine of *acquiescence*.

Deed Record.

Then too, the *Power of Attorney*, the *Patent* and the *Deed* were each recorded in the *Deed Records of* Douglas county, Nebraska, *in* 1863. (See Exhibits "A," "B," "C," D.") An inquiry at the General Land Office would have disclosed not only the location of the scrip, and the issue of the Patent, but would have *led to the discovery of the record of these instruments, the conveyance to Patrick and his possession*

of the lands and claim of title under these muniments of title. All these things could have been discovered 29 years ago, by the slightest diligence.

How did they lately discover this fraud of which they so long remained ignorant? The scrip when located would be returned to General Land Office at Washington, and a record of it kept there. The record would show that the land had been located in her name. (See Circular of General Land Office of February 22, 1864, in appendix.)

The fact that these lands were located upon, was a public fact. The fact that Patrick lived upon the land, and claimed to own it, that he had platted it as Additions to Omaha were all notorious facts, well known in this community.

Complainants Indians Living in Another State Avails them Nothing.

"It is not shown that they were not persons of education "and intelligence or that they were not in fact familiar with "the land laws, and the methods of governmental business, "or that they were not in fact as competent to look after "their rights as any.

"We all know that many of these Indians, especially the "half breeds, are well educated, intelligent, and as fully "competent to look after their business affairs as any per- "sons; and the fact that they were Indians and maintain- "ing the tribal relations, and were in a certain sense the "wards of the government, did not debar them from a hear- "ing in the courts of Nebraska." (Opinion BREWER, C. J. "p. 27, folio 44.)

Living in Remote Region.

This argument was fully answered in the case of Broderick's will, 21 Wall., 519, where the Court said :

"By their own showing their delay was due, not to ignorance of the fraud, nor any attempt to conceal it, but to ignorance of Broderick's death, and all the open and public facts of the case. They admit, and expressly charge, that it was a matter of public notoriety at San Francisco, as early as 1861, that the will in question was not Broderick's will, but was a forged and simulated paper. They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his estate, until many years after these events had transpired. Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*."

Means of Knowledge.

Sophia Felix and her husband and also the complainants had the means of knowing that this scrip had been issued and had been located on these lands. Sophia and David Garnelle, knowing that the scrip had been parted with,

were bound to use reasonable diligence, in ascertaining what had become of it and what use had been made of it. They, as well as complainants, were bound to know of the act of 1854, and also the circular order or regulation of the Land Department, concerning the manner of the location of the scrip. All the parties were, therefore, bound to know that an inquiry at the General Land Office in Washington would have disclosed that the scrip had been located on these lands—as the location was made in the name of Sophia Felix and the patent was issued in her name. The means of knowledge was at all times open to the complainants. Having the means of knowledge, they are bound to the same extent—as if they had been actually possessed of the knowledge that Patrick had located these lands—under this scrip, and had procured a patent in the name of Sophia Felix. Knowing these two facts, further inquiry would have disclosed Patrick's possession of these lands, claiming title thereto, and of the power of attorney, the quit claim deed, etc., as all were matters of record.

This means of knowledge for 25 years must defeat complainants' right of action, as it was, in law and equity, the same as actual knowledge.

In Badger vs. Badger, 2 Wall., 87, the court used this language:

"The bill in the case is entirely defective in all these "respects. It is true there is a general allegation that the "fraudulent acts were unknown to complainant till within "five years past, while the statement of his case shows "clearly that he must have known, or could have known, if "he had chosen to inquire at any time in the last thirty "years of his life every fact alleged in his bill."

Harlan, J. said in Wood vs. Carpenter, 101 U. S., 140, "If he had the means of discovery in his power he will be "held to have known it."

And again, "The means of knowledge are the same thing "as knowledge itself."

Touching the means of knowledge, at all times open to the complainants, by a simple inquiry at the General Land Office, and from thence an examination of the records of Douglas County, Nebraska, where these muniments of title were of public record. the language of the Court in Graham vs. Boston, etc. R. R., 118 U. S., 167-79 is most applicable.

The Court said:

"On the subject of laches, the Circuit Court said: 'This "bill was filed *fourteen years* after the making of the mort- "gage, *ten years* after the commencement of the bankruptcy "proceedings, *nine years* after the entry of the foreclosure "decree in the Ellis suit, and *seven years* after the fore- "closure became absolute and the road was conveyed to the "new corporation by the trustees. *During all this time the* "*records of* the court upon which appear all the proceedings "by which the alleged fraud is claimed to have been con- "summated *have been open to inspection and examination*, and "what has been done under them might have been known "to the plaintiff, if he had seen fit to make inquiry. In the "meantime, it is apparent that many persons must have "acquired rights in the stock of the new corporation, who "were ignorant of the alleged frauds. Under such circum- "stances, to set aside this mortgage, to disregard the decree "of foreclosure and the adjudication in bankruptcy, and to

"take the road out of the hands of the bondholders, who "have received no interest on their bonds since 1869, and "to place it in the hands of receivers for the benefit of the "shareholders in the old corporation, is a proposition so "wild and preposterous as hardly to merit serious consid- "eration.' We concur fully in these views."

IV.

The complainants must have used diligence to discover the fraud complained of and the Bill must disclose such diligence.

AN AVERMENT OF IGNORANCE IS NOT SUFFICIENT.

In McQuiddy vs. Ware, 20 Wall., 19, DAVIS J. said: "The "complainant says *he was in ignorance of* them until recently, "and that as soon as he ascertained them he took steps to "assert his rights. Such a *general allegation* will not suffice "to provoke the interposition of a court of equity. It will "not do to remain willfully ignorant of a thing readily "ascertainable."

In Brown vs. County of Buena Vista, 95, U. S., 157-60 it was said: "Nothing can call forth (a court of equity) into "activity but conscience, good faith, and reasonable dili- "gence; where these are wanting, the court is passive, and "does nothing."

V.

The bill must allege what fraudulent means the defendant resorted to to keep the complainants in ignorance. A mere charge of fraud is insufficient.

In the case at bar the bill contains this language: "Your "orators further say that the said Matthewson T. Patrick,

"*never informed the said Sophia* and David Garnelle, or "either of them, or your orators, or either of them, or any "other person related by blood to said Sophia Garnelle, *that* "*he had procured and located said scrip or that he had pro-*"*cured said blank instruments* and filled the same out, or had "caused a deed to be executed conveying to himself the real "estate herein before described, or that he claimed any "ownership therein, *but, on the contrary, fraudulently con-*"*cealed* the same and exercised every precaution to prevent "said proceedings coming to the knowledge of said parties."

It will be observed that this charge *does not set out what acts*, if any, Patrick did to conceal from complainants the fraud charged against them. It is not charged that Patrick had procured, or was in anywise connected with the procuring from Sophia Felix of the blank power of attorney and quit claim deed. *This general charge of ignorance* on the part of complainants, and "*fraudulent concealment*" on the part of defendants is insufficient.

In Badger vs. Badger, 2 Wall., 87, the Court said: "The "party who makes such appeal should set forth "in his bill specifically what were the impediments *to an earlier prosecution of his claim, how he came to be so long ignorant of hix rights and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill*-otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer.

"The bill in this case is entirely defective in all these re-

"spects. It is true there is a general allegation that the "fraudulent acts were unknown to complainant till within "five years past, while the statement of his case shows "clearly that he must have known, *or could have known, if* "*he had chosen to inquire at any time in the last thirty years of* "*his life*, every fact alleged in his bill."

The above language from Badger vs. Badger, was quoted by HARLAN, J. in Landsdale vs. Smith, 106 U. S., 391, with approval. HARLAN, J. then adds:

"The complainant and those whom she represents have "slept too long upon their rights. The peace of society and "the security of property demand that the presumption of "right arising from a great lapse of time, without the asser- "tion of an adverse claim, should not be disturbed. In such "cases sound discretion requires that the court should with- "hold relief."

Wood vs. Carpenter, 101 U. S., 140.

"The discovery of the cause of action, if such it may be "termed, is thus set forth: 'And the plaintiff further avers "that he had no knowledge of the facts so concealed by the "defendant until the year A. D. 1872, and a few weeks only "before the bringing of this suit.' There is nothing further "upon the subject.

"In this class of cases the plaintiff is held to stringent "rules of pleading and evidence, '*and especially must there be* "*distinct averments as to the time when the fraud, mistake, con-* "*cealment, or misrepresentation was discovered, and what the* "*discovery is, so that the court may clearly see whether, by ordi-* "*nary diligence*, the discovery might not have been before

"made.' Stearns vs. Page, 7 How., 819, 829. 'This is nec-
"essary in order to enable the defendant to meet the fraud
"and the time of its discovery.' Moore vs. Greene, et al.,
19 id., 69, 72. The same rules were again laid down in
Beaubien vs. Beaubien, 23 id., 190, and in Badger vs. Badger,
2 Wall., 95.

"A general allegation of ignorance at one time and
"of knowledge at another are of no effect. *If the plaintiff*
"*made any particular discovery, it should be stated when it was*
"*made, what it was, how it was made, and why was it not made*
"*sooner.* Carr vs. Hilton, 1 Curt. C. C. 220.

"The fraud intended by the section which shall arrest
"the running of the statute must be one that is secret and
"concealed, and not one that is patent or known. Martin,
"Assignee, etc., vs. Smith, 1 Dill., 85 and the authorities
"cited.

"Whatever is notice enough to excite attention and put
"the party on his guard and call for inquiry, is notice of
"everything to which such inquiry might have led. When
"a person has sufficient information to lead him to a fact,
"he shall be deemed conversant of it." Kennedy vs. Greene,
3 Myl. & K., 722. "The presumption is that if the party
"affected by any fraudulent transaction or management
"might, with ordinary care and attention, have seasonably
"detected it, he seasonably had actual knowledge of it."
Angell, Lim., Sec. 187 and note.

"A party seeking to avoid the bar of the statute on
"account of fraud must aver and show that he used due
"diligence to detect it, and if he had the means of discovery
"in his power, he will be held to have known it. Buckner

"& Stanton vs. Calcote, 28 Miss., 432, 434. See also Nudd
"vs. Hamblin, 8 Allen (Mass.) 130. * * *

"The subject has been several times considered in the
"State of Indiana, whence this case came. In Boyd vs.
"Boyd (27 Ind., 429), it was ruled that the concealment
"under Sect. 219, which will avoid the statute, must go
"beyond mere silence. It must be something done to pre-
"vent discovery. * * *

"Wayne et al. vs. Cornelison et al., 52 Ind., 312, was a
"case growing out of an alleged fraudulent conveyance.
"There, as here, there was a demurrer to a paragraph of the
"reply setting up concealment to countervail the defence
"of the Statute of Limitations. The allegations were not
"unlike those in the case before us. The judgment of the
"Court below sustaining the demurrer was affirmed. The
"Court said: 'The Statute of Limitations is a statute of
"repose, and where its operation is sought to be avoided by
"the party liable to the action, the allegation and proof
"should bring the case clearly within the section. The
"allegation that the defendant pretended and professed to
"the world that the transactions were *bona-fide* transactions,
"is too general to amount to anything.' A wide and careful
"survey of the authorities leads to these results:

"The fraud and deceit which enable the offender to do
"the wrong may precede its perpetration. The length of
"time is not material, provided there is the relation of de-
"sign and its consummation.

"Concealment by mere silence is not enough. There
"must be some trick or contrivance intended to exclude sus-
"picion and prevent inquiry.

"There must be reasonable diligence; and the means "of knowledge are the same thing in effect as knowledge "itself.

"The circumstances of the discovery must be fully stated "and proved, and the delay which has occurred must be "shown to be consistent with the requisite diligence.

"The reply is clearly bad. It contains some vigorous "declamation, but is wanting in the averment of facts, "which are indispensable to give it sufficiency as a plead- "ing, for the purpose intended. The complaint to which "it refers does not help it. Further remarks are unneces- "sary. The demurrer was properly sustained by the Cir- "cuit Court."

In Woolensack vs. Reiher, 115 U. S., 101, the Court said:

"The question of laches is a question of law arising on "the face of the bill, which avails as a defense, upon a gen- "eral demurrer for want of equity.

"This rule of equity pleading applies in analogous "cases; as where, it otherwise appearing on the face of the "bill that the claim is stale, or is barred by lapse of time, "and it is sought to avoid the effect of such a bar, on the "ground that the fraud complained of was concealed, and "has been only recently discovered, it is necessary that "'THE PARTICULAR ACTS OF FRAUD OR CONCEALMENT "'SHOULD HAVE BEEN SET FORTH BY DISTINCT AVERMENTS, "'AS WELL AS THE TIME WHEN DISCOVERED, SO THAT THE "'COURT MAY SEE WHETHER, BY THE EXERCISE OF ORDI-

"'NARY DILIGENCE, THE DISCOVERY MIGHT NOT HAVE BEEN "'BEFORE MADE.'"

Citing:

Beaubien vs. Beaubien, 23 How., 190;
Stearns vs. Page, 7 How., 819;
Moore vs. Greene, 19 How., 69;
Marsh vs. Whitmore, 21 Wall., 178, 185;
Godden vs. Kimmell, 99 U. S., 201;
Badger vs. Badger, 2 Wall., 89, 95;
Wood vs. Carpenter, 101 U. S., 125;
Landsdale vs. Smith, 106 U. S., 391.

In Beaubien vs. Beaubien, 23 How., 190, the Court said:

"The pleader has sought to aviod the operation of the "limitation, by an averment of concealment and fraud on "the part of the defendants, and those under whom they "claim. The plaintiffs aver 'that, until within the last "few years, your orators and oratrixes, and those under "whom they claim, verily believed and supposed that the "said brothers, Antoine and Lambert, and their legal repre-"sentatives, were acting in good faith towards them, but "that, about the year 1840, they discovered by information, "after examination and inquiry into the facts and circum-"stances of the case, that the said brothers, Antoine and "Lambert, and their legal representatives, intended to cheat "and defraud them, and those under whom they claim, of "their just rights in the premises.'

"This averment is too general and indefinite to have the "effect to avoid the operation of the statute. The particular "acts of fraud or concealment should have been set forth "by distinct averments, as well as the time when dis-

"covered, so that the Court may see whether, by the exer-
"cise or ordinary diligence, the discovery might not have
"been before made." (Stearns vs. Page, 7 How., 819; Moore
"vs. Greene, 19 *id.*, 69.)

VI.

The bill is defective because it fails to set forth:

1ST. HOW OR WHY THE COMPLAINANTS CAME TO BE SO LONG IGNORANT OF THEIR ALLEGED RIGHTS.

2ND. THE MEANS USED BY DEFENDANT TO KEEP THEM IN IGNORANCE.

3D. HOW THEY FIRST CAME TO THE KNOWLEDGE OF THEIR RIGHTS.

Complainants only state that they did not know of any of the facts set forth in the bill until 1887. How or why they did not come to know of the facts they now set forth, until this late date, is not disclosed.

There is no averment in the bill of any kind or nature touching the particular means used by defendant to keep them so long in ignorance.

The bill is equally silent as to the manner in which they so lately came into possession of the information they now pretend to have.

If these matters above suggested had been set forth in the pleading the court could have better determined the degree of laches on the part of the complainants. Such averments, if contained in the bill, might have disclosed that complainants were guilty of the most extreme neglect of their rights and duties in the premises. So faulty a

pleading cannot be tolerated. This rule of equity pleading is particularly applicable to an attempt to establish a stale trust.

In Godden vs. Kimmell, 99 U. S., 201, the Court said:

"Few cases can be found more nearly analogous to the "case before the court than the one in which the contro- "versy had its origin in this district. It had respect to a "deed of trust executed to secure certain creditors named in "the schedule annexed to the deed. Enough appears to "show that the deed was filed by the trustee himself within "twenty years, and that the subordinate court decreed that "the amount of debts enumerated in the schedule should be "paid. Appeal from that decree was taken to this court, and "Mr. Chief Justice TANEY, in disposing of the case and re- "versing the decree, remarked as follows: 'We do not "'found our judgment upon the presumption of payment "'For it is not merely on the presumption of payment, or in "'analogy to the Statute of Limitations, that a court of "'chancery refuses to lend its aid to stale demands. There "'must be conscience, good faith and reasonable diligence "'to call into action the powers of the court. In matters of "'account, where they are not barred by the Statute of "'Limitations, courts of equity refuse to interfere, after con- "'siderable lapse of time, from considerations of public policy "'and from the difficulty of doing entire justice when the "'original transactions have become obscured by time and "'the evidence may be lost.'," McKnight vs. Taylor, 1 How, 168.

"Corresponding views were expressed by Mr. Justice "STORY prior to that time, and the Chief Justice referred to.

"the same as having settled the doctrine of the Court upon "the subject. Piatt vs. Vattier, 9 Peters, 416; Smith vs. "Clay, Amb. 645.

"Courts of equity, acting on their own inherent doctrine "of discouraging, for the peace of society, antiquated "demands, refuse to interfere in attempts to establish a stale "trust, except where the trust is clearly established, *or where "the facts have been fraudulently and successfully concealed by "the trustees from the knowledge of the Cestui Que Trust.* "Relief in such cases may be sought; but the rule is that "the *Cestui Que Trust should set forth in the bill specifically "what were the impediments to an earlier prosecution of the "claim, and how he or she came to be so long ignorant of their "alleged rights, and the means used by the respondent to keep "him or her in ignorance, and how he or she first came to the "knowledge of their rights.* Badger vs. Bagder, 2 Wall., 87; "White vs. Parnther, 1 Knapp, C. C., 227.

"When a party appeals to the conscience of the chan- "cellor in support of a claim, says Mr. Justice FIELD, where "there has been laches in prosecuting it or long acqui- "escence in the assertion of adverse right, he should set "forth in his bill *specifically whct were the impediments to an "earlier prosecution of the claim;* and if he does not the chan- "cellor may justly refuse to consider his case on his own "showing, without inquiring whether there is a demurrer "or any formal plea of the Statute of Limitations contained "in the answer."

Marsh vs. Whitmore, 21 Wall., 185.

See to same effect:

Badger vs. Badger, 2 Wall., 82.

Richards vs. Mackall, 124 U. S., 183.

extent and with like effect as if she were still alive and was the complainant in this suit.

"The personal representative is effected by the delay or acquiescence of the decedent, to the same extent as if it were his own." Story, Eq. Jur., Vol. 2 Sec. 1520 d.

X

The Fact the Complainants were Members of an Indian Tribe cannot Avail them in this action.

1ST. BECAUSE AN INDIAN CAN SUE IN THE COURTS OF THE LAND.

2ND. IF THEIR TRIBAL RELATION WAS A BAR TO A SUIT, STILL THEY HAD THE RIGHT OF EXPATRIATION FROM THEIR TRIBE.

3RD. ANY IMPEDIMENT TO THE BRINGING OF A SUIT WOULD BE NO EXCUSE FOR REMAINING IGNORANT OF THEIR RIGHTS, AND WOULD BE NO EXCUSE FOR NOT NOTIFYING DEFENDANTS THAT THEY CLAIMED THE LAND AND WOULD SUE FOR IT AT THE FIRST OPPORTUNITY.

Indians though belonging to a tribe are not prohibited from bringing suits in the courts of the states or of the United States. Under the laws of the State of Nebraska, and likewise under the judiciary act of the United States, *any person* is entitled to bring a suit for the protection of his or her rights or property. That Indians are persons, within the meaning of the law, so entitled to bring and maintain a suit was fully considered in the case of the United States vs. Crook, 5th Dillon, 454, where the Court said :

"Webster describes a person as 'a living soul; a self con_
"scious being; a moral agent; especially a living human
"being; a man, woman or child; an individual of the
"human race.' This is comprehensive enough, it would
"seem, to include even an Indian. In defining certain
"generic terms, the first section of the revised statutes
"declares that the word *person* includes copartnerships and
"corporations. On the whole it seems to me quite evident
"that the comprehensive language used in this section is
"intended to apply to all mankind—as well the relators
"as the more favored white race. This will be doing no
"violence to language, or to the spirit or letter of the law,
"nor to the intention, as it is believed, of the law-making
"power of the government. I must hold, then, that *Indians*,
"and consequently the relators, are *persons*, such as are
"described by and included within the laws before quoted."

SWAYNE J., in United States vs. Rhodes, 7 Am. Law Register, 237, said:

"The common law has made no distinction on account
"of race or color. None is now made in England nor in
"any other Christian country of Europe."

The Supreme Court of Kansas, in Wiley vs. Keokuk, 6 Kan., has said:

"His (Indian's) rights are regulated by law, and when he
"appeals to the law for redress, it is not in the power of any
"tribunal to say, 'You are an Indian, and your rights rest
"'in the arbitrary decrees of executive officers and not in
"'the law.'"

The right of Indians to become citizens under certain conditions has been provided for in so many treaties

between the Indian tribes and the United States that that question is not open to discussion.

In the case of Eik vs. Wilkins, 112 U. S., 94, may be found an elaborate opinion of that Court on the subject of the citizenship of Indians who choose voluntarily to abandon their tribe and to mingle with and become a part of the mass of the population of the United States. In that case it was held by Justice Harlan and Justice Woods that the Indian possessed within himself, not only the power to separate himself from his tribe, but by such separation to clothe himself with absolute citizenship. The majority of the Court, however, were of the opinion that it required something more than a mere abandonment of the tribal relation to clothe him with citizenship. But all through that opinion was the Indian recognized as a person clothed with the same privileges, rights, powers, obligations and duties which attach to any other person without reference to race, color or nationality, and subject to be made citizens of the United States by some proper act, either by the legislative power of the states or by acts of Congress.

BREWER C. J. (p. 27-28) said:

"The thirteenth section of the bill of rights (of Nebraska) " reads as follows:

"Sec. 13. All courts shall be open, and every person, for " any injury done him in his lands, goods, person or repu- "tation, shall have a remedy by due course of law and "justice administered without delay."

"Every person" is its language; so that the doors of the " courts of this state were open to these plaintiffs as well as " to any other person who had or thought he had any claims

"to property within this state. As a matter of fact, Indians "are frequent suitors in the courts of the various states."

Many cases are cited in the opinion as illustrations (p. 28, folio 45):

For the complainants to say that an Indian has about him sufficient humanity so as to be a man, and to be clothed by acts of Congress with power to receive scrip to locate upon lands of the United States, and to own such lands in fee in his personal capacity, and to be clothed with the additional rights to inherit property as an heir of an Indian ancestor, and yet, at the same time, to be deprived of the right to go into a court to maintain his rights to, or to recover possession of, such property, involves a legal contradiction.

Expatriation from Tribe.

If the tribal relation prevented the right to sue, the complainants had the election of severing the tribal relation and thereby sustaining the same relation to the laws of the States and United States that other persons, of whatever race, color or nationality, sustain.

In the Dred Scott case, 19 How., 404, it was said: "And "if an individual (Indian) should leave his nation or tribe, "and take up his abode among the white population, he "would be entitled to all the rights and privileges which "would belong to an emigrant from any other foreign "people."

In the report of the judiciary committee of the Senate, pursuant to the resolution of April 7, 1870, and made by the Hon. Matthew H. Carpenter, is found this language:

"It is pertinent to say in concluding this report, that "treaty relations can properly exist with Indian tribes or "nations only, and that, when the members of a tribe are "scattered, they are merged in the mass of our people, and "become equally subject to the jurisdiction of the United "States."

Judge Cooley, in his edition of Story of the Constitution, page 655, Vol. 2, says:

"When, however, the tribal relations are dissolved, when "the headship of the chief, or the authority of the tribe, is "no longer recognized, and the individual Indian, turning "his back upon his former mode of life, makes himself a "member of the civilized community, the case is wholly "altered. He then no longer acknowledges a divided alle- "giance, he joins himself to the body politic, he gives evi- "dence of his purpose to adopt the habits and customs of "civilized life, and, as his case is then within the terms of "this amendment, it would seem that his right to protec- "tion, in person, property and privilege, must be as com- "plete as the allegiance the government to which he must "then be held—as complete, in short, as that of any native "born inhabitant."

Ex parte Kenyon, 5 Dillon, 390, the Court says:

"When the members of a tribe of Indians scatter them- "selves among the citizens of the United States, and live "among the people of the United States, they are merged in "the mass of our people, owing complete allegiance to the "Government of the United States, and of the state where "they may reside, and equally with the citizens of the

"United States, and of the several states, become subject to "the jurisdiction of the courts thereof."

In United States vs. Crook, 5 Dillon, 454, it was said:

"The question of expatriation has engaged the attention "of our government from the time of its very foundation. "Many heated discussions have been carried on between our "own and foreign governments on this great question, until "diplomacy has triumphantly secured the right to every per- "son found within our jurisdiction. This right has always "been claimed and admitted by our government, and it is "now no longer an open question. It can make but little "difference then, whether we accord to the Indian tribes a "national character or not, as in either case, I think the indi- "vidual Indian possesses the clear and God-given right to "withdraw from his tribe and forever live away from it, as "though it had no further existence."

SECOND GROUND OF DEMURRER.

No Trust Relationship Exists Between Defendants and Complainants.

The bill charges that on the 31st day of March, 1860, some person to complainants *unknown* procured the execution of the Power of Attorney in blank and a quit claim deed in blank. (Folio 4 of bill). There is no claim that any of the defendants had anything to do with the procuring of these two instruments, and *no fraud is charged* upon any of the *defendants* with reference to such procurement.

The bill charges that in November. 1861, the defendant, M. T. Patrick, procured, *from some person unknown* to the

complainants, the possession of the scrip. (Folio 5 of bill). It does not appear how this scrip passed from the possession, of Sophia Felix.

There is no claim that she ever intrusted it to M. T. Patrick or ever charged him with any duty or obligation relating thereto. It is charged that Patrick located the scrip upon the lands in dispute and that he then knew that Sophia Felix was the owner of said scrip. This is nothing more than a legal inference to be drawn from the fact that the scrip was in her name.

Taking all the facts set forth in the bill into consideration, they amount to nothing more than an averment that Patrick came into possession of this scrip without the knowledge or consent of Sophia Felix, *not as her agent, but a stranger to her*, and appropriated the scrip to his own use. There was *no agency* existing between them. There was *no trust or confidence bestowed*. There was no breach of faith; *no fiduciary relationship existing*.

The bill charges (p. 4, folio 6) that Patrick had been in possession of this land and had attempted to acquire title by pre-emption, but being unsuccessful, he procured and located the scrip "*designedly for his own benefit*" and "to "acquire title to said tract of land" for himself.

This is pointedly stated in the opinion of the court as follows: (p. 26, folio 42).

"What he (Patrick) did, even if wrongful, and in viola-"tion of her rights, was done, from the first, *for himself and* "*in his own behalf.*"

"The averments in the bill show that he *never* took this "scrip intending to act *as her agent*, but that he took it "wrongfully and *in violation of her rights.*"

Again (p. 27, folio 43): "Knowing as we do how land "scrip passed in the market, the only fair understanding of "the facts as disclosed by the bill is that this scrip was "wrongfully obtained from Sophia Felix, and placed on the "market, and that defendant, seeking scrip wherewith to "enter this land, found and purchased this. *He took it to "use for himself and not for her, so that none of the elements of "an express trust enter into the transaction.*

From all that appears Patrick located the scrip, under a claim of ownership, and, when the location had been made, caused the conveyance to be made in his name. These facts are not sufficient to charge the defendants as trustees.

Unjust to give Felix Land Worth a Million and a half for Scrip only Worth a few Hundred Dollars.

The doctrine of constructive or implied trust is only asserted by a court when it becomes necessary to do so for the purpose of doing absolute justice between the parties, and it is not a doctrine asserted by the courts where the remedy at law is fully adequate to do complete justice between the parties.

In the case at bar, if the scrip had been located upon a piece of land not within the corporate limits of the city of Omaha, but upon the same number of acres of rugged or untillable soil, and which had not since developed into a piece of property of so considerable value, the complainants would have been perfectly willing to have asserted a claim against Patrick for the value of the scrip and not have invoked the doctrine of trusteeship.

The complainants would be fully reimbursed for what they have lost if they recover in a court of law what would have been the fair market value of this scrip at the date of the location with the accumulated interests on such sum of money.

It chances, however, in the present case that the scrip was located within the limits of a city, and by reason of the growth of the city of Omaha and of the enterprise of these defendants in having the same platted and made a part of said city, the lands have increased to an immense value. This great enhancement in value is not attributable to the location of this scrip upon these lands. It is not the outgrowth of the location of this scrip upon these lands.

If Sophia Felix had remained the owner and custodian of this scrip, and had sought to locate the same upon the public lands, there is no presumption that she would have located the same upon the lands now in dispute. She was evidently entirely ignorant of the prospective fortune liable to come to the lot of any person or persons who should invest capital in the lands within the corporate limits of the City of Omaha. She was a stranger to this locality.

If these complainants were as ignorant as they assert in their bill they perhaps would not have heard of the City of Omaha, or its prosperity, during all these years. Sophia Felix would most naturally have made the location upon some lands in the immediate neighborhood in which she lived, perhaps upon wild and untillable soil. What she would have reaped from such location would have been an inconsiderable sum compared to the value of the property now in dispute.

To seek to take the property from these defendants under the doctrine of trusteeship, is not giving the complainants what they would have reaped by the ordinary happening of events, had Sophia Felix remained the owner and herself have located the scrip upon the public lands of the United States. To give to the complainants the lands in dispute would be taking from a large number of people property, which justly and equitably belongs to them, and transferring to the complainants a fortune far surpassing their wildest visions of hope, and which justice does not require should be transferred to them. It is not a case where the doctrine of constructive trust should be applied either upon principle or equitable considerations.

No Constructive or Implied Trust Unless there Existed some Fiduciary Relation Between the Parties.

Perry on Trusts, Vol. 1, p. 144.

"But if one who stands in no fiduciary relation to another "appropriates the other's money, and invests it in real estate "or other property, *no trust results to the owner of the money.*"

Again, p. 152.

"But if one standing in on fiduciary relation obtains "another's property wrongfully and invests it in land in "his own name, or, if a clerk appropriates his master's "money, and buys real estate in his own name, *there is no "resulting trust.*"

In Hawthorn vs. Brown, 3 Sneed, 463, the Court said:

"The legal principle stated in the charge is not, we think, "applicable to this case. The principle is maintained both

"at law and in equity, that if a trustee, or other person "standing in a fiduciary relation, wrongfully converts a "trust fund into another species of property, the benefi- "ciary will be entitled to the property thus acquired, and "he may sue for it at law. Taylor vs. Plurner, 3 Mau. and "Sel. 574. In such case the wrongful act of the trustee is "not binding on the beneficiary; and it is a matter entirely "at the option of the latter whether to take the substituted "property, or to disclaim any title thereto, and proceed "upon his remedy *in personam*.

"*But this principle does not apply where*, as, in the present "case, a person standing in no fiduciary relation wrongfully "obtains a portion of a trust fund, and invests the same in "property for his own benefit, without the knowledge and "against the will of the trustee and beneficiary. The bare "statement of the case excludes the idea of any trust. The "title to the property thus acquired vests in the purchaser."

The same legal principle was followed in Ensley vs. Balentine, 4 Humphreys 233, where the Court said:

"It may also be well questioned whether, if a father or "other person take into his possession the property of "another, acting under a claim of right in himself, and sell "such property, vesting the proceeds in land, a trust would "result in favor of the true owner of the property so taken.

"THE TAKING WOULD BE A CONVERSION, AND THE MONEY "ARISING FROM THE SALE OF SUCH PROPERTY WOULD BELONG "TO THE WRONG-DOER, AND HE WOULD BE ANSWERABLE IN "DAMAGES TO THE TRUE OWNER."

Doyle vs. Murphy, 22 Ill., 502, (74 Am. Dec., 165), was a bill in equity to establish a trust. The mother of the com-

plainants had delivered money to Maurice Doyle, since deceased, to pay certain debts, but he converted the money to his own use, also certain bank debentures were placed in an iron safe left with Doyle. Doyle, by means of false keys, opened the safe, abstracted the debentures, and placed forged ones in their stead. The bill prayed a discovery of the assets and for a recovery of the proceeds. The Court held that no trust existed as to the money and said:

"According to no rule or adjudged case that we are "aware of was it a trust fund, authorizing Mrs. Byrne or "her representatives to recover as a trust fund."

As to the debentures the Court held that no trust existed as no fiduciary relation existed between the parties. The Court said:

"The debentures were not placed in his possession as "such, but they were locked against him. She gave him "no power over them, but manifestly intended that he "should have none. And if he ever acquired the posses- "sion of them, it was by larceny, or at the least by a tres- "pass, when he committed a forgery. *And the acquisition "of property by either larceny or trespass, it is believed, has "never been held to create the relation of trustee and cestui que "trust.*"

The last above case was recognized in Steele vs. Clarke, 77 Ill., 471, where Justice Breese said:

"A court of equity has jurisdiction in all cases of strict "trust, but where a mere confidence is reposed, or a credit "given, it will not exercise such jurisdiction. As this Court "said, in Doyle et al, vs. Murphy et al, 22 Ill., 502, the vari- "ous affairs of life, in almost every act between individuals

"in trade and commerce, involve the reposing of confidence "or trust in each other, and yet it has never been supposed "that because such confidence or trust in the integrity of "another has been extended and abused, therefore a court of "equity would, in all such cases, assume jurisdiction."

In Taylor vs. Turner, 87 Ill., 296, a bill in chancery was filed by Turner to recover of Taylor the proceeds of a sale of certain wheat, which Taylor had sold as a commission merchant, the bill alleging that Taylor took the wheat in trust and held the proceeds as trustee. The court dismissed the bill.

Mr. Justice Sheldon said:

"It seems to us to be a simple case of the bailment of "property to a factor to sell, and his refusal to pay over the "proceeds of the sale to the owner of the property, and we "know not why the legal remedy of an action for money had "and received is not ample. If, by the allegation that the "property was received upon a trust, the case may be brought "within the jurisdiction of a court of chancery, we do not "see why it might not be the same in every case of the bail-"ment of personal property."

Weer vs. Gand, 87 Ill., 490 was a case where Charles Weer, in his lifetime, guardian of Virginia Whitaker, died with a large amount of money in his hands, belonging to his ward. The question under consideration was, whether the claim against the estate of Charles Weer for this money could be prosecuted as for money held by the deceased in *trust* for any purpose. The Court denied the relief sought.

Mr. Justice Craig in opinion said:

"Lord Hardwick, in Stuart vs. Mellish, 2 Atk., 612,

"defines a trust in these words: '*A trust is where there is*
"'*such confidence between parties* that no action at law will
"'lie but is merely a case for the consideration of this court.'

"Law writers often divide trusts into four general classes,
"with reference to their creation: express trusts, implied
"trusts, resulting trusts, and constructive trusts. The facts
"of this transaction do not bring it within the definition of
"either. Perry on Trusts, 13. Nor are we aware of any
"principle of law under which the money due from the
"deceased to appellee can be regarded as a trust fund. Had
"property been conveyed to or placed in the hands of the
"deceased by appellee's father, or some other person, to
"hold for the use and benefit of appellee, then a trust
"would have been created which a court of equity would
"have protected, and compelled the application of the
"property to the uses and purposes of the trust, but such is
"not this case.

"Appellee voluntarily placed her property in the hands
"of Weer to manage and control for her. Upon a settle-
"ment, he became a debtor, and gave his notes as evidence
"of the indebtedness. She occupied the same relation to
"the estate upon the death of Weer, as any ordinary cred-
"itor. The case, in principle, does not differ from Doyle
"vs. Murphy, 23 Ill., 502, where it was held that courts of
"equity will not assume jurisdiction to establish trusts in
"every case where confidence has been reposed, or a credit
"given. See, also Steele vs. Clarke, 77 Ill., 471."

In Wentworth vs. Wentworth, 2 Minnesota, 277 (72 Am. Dec., 97), it was held:

"*Neither resulting nor express trust arises or is created,*

"under the Minnesota statutes, in favor of one who settles "upon and improves government land and agrees by parol "with another that the latter should enter it in his own "name at the land office, pay for it, and convey it to the "former upon repayment of the purchase price."

Garvey vs. Jarvis, 46 N. Y., 310, was a case where A. had a judgment against B. for $2,000. C. falsely represented to A. that he was an agent of B. and by this fraud procured an assignment of the judgment for $500. B. contended that C. held the judgment as a trustee for him.

CHURCH, C. J., said:

"But it is urged by the plaintiff that the defendant held "the judgment as a trustee for him; that Malcolm assigned "it believing it was for the plaintiff; that the defendant pro- "cured it by a fraud; and that in such cases a trust is raised "*ex maleficio*, and the fraudulent recipient is turned into a "trustee to 'get at him.' I have examined all the cases "cited, and none of them makes the principle invoked "applicable to the facts of this case.

"*It may be laid down, as a general rule, that this principle* "*does not apply, unless the defendant occupies some fiduciary* "*relation to the party making the claim, or that the former owed* "*to the latter some duty or obligation with respect to the prop-* "*erty.* A stranger cannot claim the benefit of a purchase of "property by another, merely because the latter falsely "stated that he was acting for the former."

Dixon vs. Caldwell, 15 O. S., 412, was a case where Caldwell had issued to him, by the government, a military land warrant for 160 acres of land, This warrant was fraudulently obtained from him, and by a stranger who

represented himself to be Caldwell, and forged Caldwell's name, sold to Dixon who located same on the land in suit. Caldwell sought to charge Dixon as his trustee for the land so located.

This relief the Court denied and left Caldwell to his action at law to recover the value of land warrant.

In Campbell vs. Drake, 4 Ired. Eq., 94, which was a case where a clerk in a store had pilfered money from his employer, and with the money so pilfered he had purchased land, it was held, that the clerk could not be *held* as the trustee of the land for the benefit of his employer, so as to enable the employer to compel a conveyance of the legal title.

All of the foregoing authorities either directly assert or bear out the proposition that in order to make the holder of the legal title to land a trustee for the benefit of another, there must have existed some fiduciary relation in a greater or less extent, or some duty resting upon the person who acquired the land to make disclosure to the other party. In the present suit Felix and Patrick were strangers to each other and no obligations of any sort whatsoever existed between them. There was no contract existing between them by which Patrick could be charged with committing any fraud upon Sophia Felix arising out of any contract. There did not exist the relationship of principal and agent or of master and servant, or any other relationship falling within any of the classifications laid down by the text writers and judges, sufficient to constitute a fiduciary relationship out of which the doctrine of trusts could arise. As we have already stated, the enforcement of the equitable doctrine of

trusts in this case would not result in doing justice between the parties, but would result in giving the complainants an amount of property unreasonable in extent, compared to that with which Sophia Felix parted, and would likewise do gross injustice to each and all of the defendants.

Lapse of Time Applies to Constructive Trusts.

"In the case of an implied or constructive trust, unless "there has been a fradulent concealment of the cause of "action, lapse of lime is as complete a bar in equity as in "law." Speidel vs. Henrici 120, U. S. 386.

This is particularly true where defendant holds under a claim *"unequivocally adverse and without anything having been done or said directly or indirectly, to recognize the title of such rightful owner by the adverse possessor."* Elmendorf vs. Taylor, 10 Wheaton, 175.

Third Ground of Demurrer—Act of Congress.

Congress Ratified and Confirmed the Legal Title to this Property in the Defendant, M. T. Patrick.

The bill recites (folio 8) that the defendant Patrick procured to be enacted by the Congress of the United States an act to confirm title in him to these lands. This court will presume that when the Congress of the United States passed an act to confirm the title to these lands in the defendant, Patrick, that it was not engaged in any scheme to enable Patrick to defraud these complainants. The charge in complainants' bill that Patrick procured the passage of this law *in furtherance of a scheme to wrong Sophia Felix* is a charge imputing bad faith to the government. The maxim

that the king can do no wrong applies equally to the Congress of the United States. This court would not permit an inquiry into a proposition which charged an act of the Congress of the United States to be fraudulent.

In *ex parte* McArdle, 7 Wall., 514, THE CHIEF JUSTICE said:

"We are not at liberty to inquire into the motives of the "legislature, we can only examine into its power under the "Constitution."

As to the right to make such inquiry, COOLEY said:

"The argument has in no case been acceded to by the "judiciary and they have never allowed the inquiry to be "entered upon." Cooley's Constitutional Limitations, 187.

If, therefore, this court shall be limited in its inquiry as to the constitutional power of Congress to pass the act in question, we have the simple proposition that the Congress of the United States ratified and confirmed in the defendant, Patrick, the title to these lands.

"That act is beyond challenge. The knowledge and good "faith of a legislature are not open to question. It is con- "clusively presumed that a legislature acts with full knowl- "edge and in good faith." United States vs. DesMoines, etc., 142 U. S., 544.

The act of Congress confirming the Patrick title is printed in appendix to this brief.

Let it be observed that the act of Congress set forth in the bill contains this phraseology: "*And that the title to the same "is hereby confirmed to the parties holding by deed from the "patentee.*" By this langauage the Congress of the United States knew that a deed had been executed from the patentee

to the defendant, Patrick, and Congress intended by that act to confirm the title in Patrick, the person holding by the deed from the patentee, Sophia Felix.

Now, for the purpose of the discussion, admitting what the bill charges to be true, to-wit: that here was a wrongful and fraudulent entry or location upon these lands, or in other words, that the steps which had been taken to obtain the title to these lands from the United States to the defendant Patrick were illegal and invalid; if the Congress of the United States, having the power to dispose of the public lands of the United States upon whatsoever terms or conditions it saw fit, declared by this act of Congress the title to be confirmed in the defendant, Patrick, this was equivalent to an original grant or conveyance of these lands from the government to the defendant Patrick.

In speaking of a like act of Congressin Ryan vs. Carter, 93 U. S. 82, the Court said: "It does not require the produc-
"tion of proofs before any commission or other tribunal
"established for that special purpose, but confirms, *proprio*
"*vigore*, the rights, titles and claims to the lands embraced
"by it, and operates as a grant, to all interests and pur-
"poses. Repeated decisions of this court have declered that
"such a statute passes the title of the United States as
"effectually as if it contained in terms a grant *de novo*, and
"that a grant may be made by a law as well as by a patent
"pursuant to law."

See also Longdeau vs. Hanes 21 Wall, 521-529.

Deseret Salt Co. vs. Tarpy, 142 U. S., 241.

The defendants, therefore, have the right to insist that they own these lands by virtue of this act of Congress.

The defendants are justified in standing upon this act of Congress alone as the original source of their title. It is a title which complainants cannot impeach and it is a title which complainants cannot ask to have declared to be in trust for them.

Fraud on United States.

The bill of complaint (folio 7) charges that Matthewson T. Patrick "was in possession of the premises upon which "said scrip was located and had attempted to acquire title "to the same by pre-emption, but in that respect was "unsuccessful, and the said scrip was procured and located "by the said Matthewson T. Patrick designedly for his own "benefit and to acquire title to said tract of land, which "title he could not acquire by virtue of the acts of Congress "with respect to pre-emption."

If this averment in the bill be true, then one of two propositions must likewise have been true: *first*, that the lands were not subject to pre-emption; or, *second*, that Patrick was personally disqualified from pre-empting these lands. It follows, therefore, that if Patrick procured the possession of the scrip and so located the same on these lands for the purpose of acquiring title to the lands from the Government of the United States which were not subject to being pre-empted, or to which he personally was disqualified from pre-empting, then a fraud was committed upon the United States and the United States was wrongfully and fraudulently deprived of the title to these lands. The averment in the bill is, therefore, nothing more nor less than an averment that Patrick acquired the title to these lands from the Government by fraud. To maintain the present bill,

therefore, the complainants seek to ratify that fraud both as against themselves and as against the Government of the United States and out of that fraud to acquire the title to this property. This cannot be done.

Warren vs. Van Brunt, 19 Wall., 646.
Story's Eq., Vol. 2, Sec. 1201, b.
Perry on Trusts, Vol. 1, Sec. 165.

CONCLUSION.

The real estate involved in this suit, stripped of its improvements, is to-day worth a million and a half of dollars. A glance at the history of this litigation as disclosed by the facts set forth in the bill, as well as from the records of this court, before referred to, make it apparent that this suit is largely speculative in its character. The sudden great enhancement in the value of real estate in the city of Omaha has become fruitful of such litigation. The question which addresses itself directly to the conscience of this court is whether this litigation shall be permitted to proceed, thus disturbing the title to property now distributed among a large number of our citizens, and by such disturbance to inflict financial hardships upon the families who now occupy portions of this property as their homes.

Such suits should receive the strongest stamp of disapproval at the hands of this court and at the earliest opportunity.

JNO. L. WEBSTER.
Solicitor for Deft. Patrick and others.

APPENDIX.

U. S. Statutes at Large, Vol. 10. P. 304.

"July 17th, 1854. Chap. LXXXIII.—An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota, belonging to the half-breeds or mixed-bloods of the Dacotah or Sioux Nation of Indians, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of* "*the United States of America, in Congress assembled:* That "the President be, and he is hereby, authorized to exchange "with the half-breeds or mixed-bloods of the Dakotah or "Sioux Nation of Indians, who are entitled to an interest "therein, for the tract of land lying on the west side of "Lake Pepin and the Mississippi River, in the Territory of "Minnesota, which was set apart and granted for their use "and benefit, by the ninth article of the Treaty of Prairie "Du Chien, of the fifteenth day of July, one thousand "eight hundred and thirty; and for that purpose he is hereby "authorized to cause to be issued to said persons, on the "execution by them, or by the legal representatives of such "as may be minors, of a full and complete relinquishment "by them to the United States of all their right, title, and "interest, according to such form as shall be prescribed by "Commissioner of the General Land Office, in and to said "tract of land or reservation, certificates or scrip for the "same amount of land to which each individual would be "entitled in case of a division of the said grant or reservation "*pro rata* among the claimants—which said certificates or "scrip may be located upon any of the lands within said res-"ervation not now occupied by actual and *bona fide* settlers

"of the half breeds or mixed-bloods, or such other persons as "have gone into said Territory by authority of law, or upon "any other unoccupied lands subject to pre-emption or "private sale, or upon any other unsurveyed lands, not re- "served by Government, upon which they have respectively "made improvements: *Provided*, That said certificates or "scrip shall not embrace more than six hundred and forty, "nor lees than forty acres each, and provided that the same "shall be equally apportioned, as nearly as practicable, "amongthose entitled to an interest in said reservation: *And* "*provided further*, That no transfer or conveyance of any of "said certificates or scrip shall be valid.

"SEC. 2. *And be it further enacted*, That the President "be, and he is hereby, authorized to cause to be ascertained "the number and names of the half-breeds or mixed-bloods "who are entitled to participate in the benefits of the said "grant or reservation as aforesaid, before the issue of the "certificates or scrip provided for in the preceding section.

"SEC. 3. *And be it further enacted*, That from and after "the passage of this act, the President is authorized to have "the lands within the said reserve surveyed and exposed to "public sale at the Land Offices for the districts in which "said lands may lie, according to the boundaries of the sev- "land districts recently established by Congress, in the "same manner as other public lands.

"*Approved, July* 17, 1854."

Circular.

"*Relative to the location of half-breed Dacotah or Sioux* "*scrip, issued under the Act of Congress, approved July* 17, "1854—*U. S. Stat. at Large*, Vol. 10, p. 304.

"GENERAL LAND OFFICE,
"February 22, 1864.

"Gentlemen:—Questions frequently arise in regard to the "location of Dacotah or Sioux half-breed scrip, issued some "years ago from the Office of Indian Affairs. * * *

"The land selected in satisfaction of a certificate of scrip "must of course be located in the name of the party in "whose favor the scrip is issued, and the location may be "made by him or her in person, or by his or her guardian "or duly authorized agent. The application should be duly "attested in each case by the Register and Receiver, and at- "tached to each should be your certificate to the following effect:

'LAND OFFICE AT.....,
'....., 1864.

"'We hereby certify that the within scrip has, this..... "'day of....., been located on the.....containing..... "'acres, agreeably to the act of 17th July, 1854, and by the "'party duly authorized to make the location.

"'Attest: '....., Register.'
'....., Receiver.'"

"No receipt is to be issued to the locator, except in un- "avoidable cases, where there may be a small excess in the "area of the location over the scrip, and in that case it must "be paid for, and the receiver will issue his receipt, which "he will number and account for, as in the case of bounty

"land warrant excess. But no certificate of purchase is to "be issued; the scrip and application, instead of certificates "of purchase, being the instruments of title which are to be "returned to the General Land Office in this class of business.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS, Commissioner."

U. S. Statutes at Large, Vol. 15, P. 186.

"*An act to confirm the title to certain lands in the State of* "*Nebraska.*

"*Be it enacted by the Senate and House of Representatives of* "*the United States of America, in Congress assembled*, That in "all cases in which the Commissioner of the General Land "office, or the Secretary of the Interior, has finally decided "in favor of pre-emption settlers or the locators of Indian or "half-breed scrip, and issued patents to them for lands "within the corporate limits of the city of Omaha, in the "State of Nebraska, *the right and title of the patentee or pat-* "*entees* shall not be defeated or impaired because such land "was within the said corporate limits, but if good in every "other respect the title shall be good and valid notwithstand- "ing the entry thereof, by any pre-emptor or locator of "Indian or half-breed scrip, was forbidden by *the tenth sec-* "*tion of the act of September Fourth, Eighteen hundred and* "*Forty-One*, because so within said limits: *Provided*, That the "following tracts of lands, to-wit: the north half of the "northwest quarter of section fifteen; the west half of the "southwest quarter of section ten; the east half of the south-

"east quarter, and the northwest quarter of the southwest "quarter of section nine, township fifteen, north of range "thirteen, east of the sixth principal meridian, are hereby "excepted from the operation of this act." Approved July 25th, 1868.

Afterward on February 2, 1869, another act of Congress was passed extending the provisions of the act of Congress of July 25th 1868, to the lands in controversy. This act is as follows (15 U. S. Stat. L. 269):

An act supplementary to an act entitled 'An act to confirm the "title to certain lands in the State of Nebraska.'

"*Be it enacted by the Senate and House of Representatives of "the United States of America, in Congress assembled,* That "the provisions and benefits of an act, entitled 'An act "'to confirm the title to certain lands in the State of Ne-"'braska,' approved the 25th day of July, Anno Domini "Eighteen Hundred and Sixty-eight, be, and the same are "hereby, extended to the east half and northwest quarter of "the southeast quarter of section nine, township fifteen, range "thirteen east, sixth principal meridian, in Douglas county, "Nebraska, *and that the title of the same is hereby confirmed "to the parties holding by deed from the patentee.*"

CODE OF NEBRASKA.

Time of Commencing Civil Action.

"SEC. 5—LIMITATION—Civil actions can only be com-"menced within the time prescribed in this title, after the "cause of action shall have accrued.

"SEC. 6—RECOVERY OF REAL PROPERTY, MORTGAGES—"An action for the recovery of the title or possession of

"lands, tenements, or hereditaments, can only be bought "within ten years after the cause of such action shall have "accrued. This section shall be construed to apply also to "mortgages.

"SEC. 7.—SAME, PERSONS UNDER DISABILITY—Any per- "son entitled to commence any action for the recovery of "the title or possession of any lands, tenements or here- "ditaments, who may be under any legal disability, when "the cause of action accrues, may bring such action within "ten years after the disability is removed and at no time "thereafter."